Supreme Court, U.S.
FILED

961425 MAR 10 1997

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDALL A. TERRY, REVEREND PATRICK MAHONEY, A. DAVID HENDERSON, ROBERT JEWITT, JOSEPH J. SLOVENEC, AND REVEREND JAMES L. RUDD,

Petitioners,

- v. -

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, AND ERIC HOLDER, UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
MARK N. TROOBNICK
WALTER M. WEBER
American Center for Law & Justice
1000 Thos. Jefferson St. N.W.
Suite 609
Washington, DC 20007
(202) 337-2273

THOMAS P. MONAGHAN
FRANCIS J. MANION
The New Hope Life Center, ACLJ-New Hope
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

JOHN G. STEPANOVICH
American Center for Law & Justice
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 579-2489

Attorneys for Petitioners

81PP

QUESTIONS PRESENTED

1. Does the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248, exceed the constitutional powers of Congress under the Commerce Clause, U.S. Const. art I, § 8, cl. 3?

2. Does FACE unconstitutionally discriminate against opponents of abortion in violation of the First and Fifth Amendments, U.S. Const. amends. I, V?

3. Does FACE violate the free speech and assembly guarantees of the First Amendment, U.S. Const. amend. I?

PARTIES

The names of all the principal parties to the proceedings in the court below appear in the caption of this case.[1] In addition, the following parties were granted status as intervenor-defendants in the district court and filed a brief as intervenor-appellees in the court of appeals:

Capitol Women's Center
Commonwealth Women's Clinic
National Abortion Federation
National Organization for Women
Planned Parenthood Federation of America, Inc.
Planned Parenthood of Metropolitan Washington, D.C.
Dr. George R. Tiller
Dr. Susan Wicklund

---

[1]None of the petitioners is a corporation. See Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE PUBLIC HAS A STRONG INTEREST IN RESOLVING THE CONSTITUTIONALITY OF FACE. 4

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN UNITED STATES v. LOPEZ AND RAISES IMPORTANT AND UNSETTLED QUESTIONS OF CONSTITUTIONAL LAW 8

A. FACE Represents a Drastic and Unprecedented Expansion of Congressional Authority under the Commerce Clause, in Conflict with Lopez. 8

1. Aggregation of commercial activities 11

2. Jurisdictional element 12

3. Going beyond Lopez 12

B. FACE Imposes Discriminatory, Vague, and Overbroad Restrictions on Expressive Activity 15

1. First Amendment rights are implicated 16

2. FACE is a viewpoint-based ban on speech 18

3. FACE is unconstitutionally vague and overbroad 21

a. vagueness 22

b. overbreadth 24

CONCLUSION 26

APPENDICES:

A. Opinion, U.S. Court of Appeals for the District of Columbia Circuit (Dec. 10, 1996) 1a

B. Memorandum Opinion, U.S. District Court for the District of Columbia (Nov. 21, 1995) 24a

C. Order, U.S. District Court for the

District of Columbia (Nov. 21, 1995) 36a

D. Constitutional Provisions:

1. Commerce Clause, U.S. Const. art. I, § 8, cl. 3 ..... 37a

2. First Amendment, U.S. Const. amend. I 37a

3. Fifth Amendment, U.S. Const. amend. V 37a

4. Tenth Amendment, U.S. Const. amend. X 37a

E. Freedom of Access to Clinic Entrances (FACE), 18 U.S.C. § 248 (1994) 38a

TABLE OF AUTHORITIES

Cases — Page

American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995) 6

Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) 25

Brandenburg v. Ohio, 395 U.S. 444 (1969) 17

Carey v. Brown, 447 U.S. 455 (1980) 20

Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) 6

City of Boerne v. Flores, 117 S. Ct. 293 (1996) 5

City of Houston v. Hill, 482 U.S. 451 (1987) 21, 25

Colorado Republican Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996) 5

Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994), vacated, 74 F.3d 97 (5th Cir. 1996), on remand, No. 94-0980 (W.D. La. Nov. 5, 1996) 6

Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994) 6

Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990) 20

Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) 4

Felker v. Turpin, 116 S. Ct. 2333 (1996) 5

Frisby v. Schultz, 487 U.S. 474 (1988) 20

Hoffman v. Hunt, 923 F. Supp. 791 (W.D. N.C. 1996), appeal pending, Nos. 96-1581, 96-1582, 96-1623 (4th Cir. to be argued Apr. 9, 1997) 5

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 17

Kovacs v. Cooper, 336 U.S. 77 (1948) 22

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) 18, 20

Lee v. ISKCON, 505 U.S. 830 (1992) 22

Lucero v. Trosch, 904 F. Supp. 1336 (S.D. Ala. 1995) . . 25

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 9

NAACP v. Button, 371 U.S. 415 (1963) 21

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 17

New York v. Ferber, 458 U.S. 747 (1982) 25

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 16

Perez v. United States, 402 U.S. 146 (1971) 9, 10

Planned Parenthood Ass'n of Southeastern Pennsylvania, Inc. v. Walton, 949 F. Supp. 290 (E.D. Pa. 1996) 6

Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists, 946 F. Supp. 1355 (D. Or. 1996) 6

Police Dep't v. Mosley, 408 U.S. 92 (1972) 20

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 17, 18, 20, 21

Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994) 6

Russell v. United States, 471 U.S. 858 (1985) 12

Schacht v. United States, 398 U.S. 58 (1970) 20

Schenck v. Pro-Choice Network of Western New York, No. 95-1065 (U.S. Feb. 19, 1996) 16

Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991) 17

Spence v. Washington, 418 U.S. 405 (1974) 17

Terry v. Reno, No. 94-1154(HHG) (D.D.C. Nov. 21, 1995) 1, 3

Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996) ..... 1, passim

Texas v. Johnson, 491 U.S. 397 (1989) 17, 20

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) 17

United States v. Bass, 404 U.S. 336 (1971) 12

United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), cert. denied, 117 S. Ct. 613 (1996) 6

United States v. Lopez, 115 S. Ct. 1624 (1995) ... 3, passim

United States v. Scott, 919 F. Supp. 76 (D. Conn. 1996) 6

United States v. Soderna, 82 F.3d 1370 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996) 6

United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995) 6

United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995), rev'd, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996) 5

United States v. Wilson, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46 (1996) 5, 6, 12

United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 10

Wickard v. Filburn, 317 U.S. 111 (1942) 9, 10

Constitutions, Statutes, and Rules

Rule 12(c), Fed. R. Civ. P. 3

18 U.S.C. § 248 . . . . . 2, passim

18 U.S.C. § 922(q) 9, 11, 12, 14

28 U.S.C. § 1254(1) 2

U.S. Const. art. I, § 8 . . . . . 2, passim

U.S. Const. amend. I . . . . . 2, passim

U.S. Const. amend. V 2, 4, 15, 16, 20

U.S. Const. amend. X 2, 9

U.S. Const. amend. XIV 2, 16, 17, 20

Other Authorities

6 Am. Jur. 2d Assault and Battery § 3 (1963) 23

S. Rep. No. 117, 103rd Cong. 1st Sess. 3 (1993) 18

Comment, "FACE"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech? 64 U. Cin. L. Rev. 947 (1996) 6

"Jackson Freed," USA Today, Feb. 12, 1997, p. 3A 15

Kosinski, Introduction to Volume Nineteen, 19 Harv. J. L. & Pub. Poly 1, 5 (1995) 13

Note, About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of Lopez, 11 St. John's J. Legal Commentary 191 (1995) 6

Note, "FACE"-ing the Constitution: The Battle over the Freedom of Access to Clinic Entrances Shifts from Reproductive Health Facilities to the Federal Courts, 46 Cath. U.L. Rev. 165 (1996) 6

Note, Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248: The Controversy behind the Remedy, 20 Seton Hall Legis. J. 128 (1996) 6

Rose & Osborn, FACE-ial neutrality: A Free Speech Challenge to the Freedom of Access to Clinic Entrances Act, 81 Va. L. Rev. 1505 (1995) 6, 7

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDALL A. TERRY, et al.,

Petitioners,

- v. -

JANET RENO, Attorney General of the United States,
and ERIC HOLDER, United States Attorney
for the District of Columbia,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

DECISIONS BELOW

The decision of the court of appeals is reported as Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996) (App. A). The decision of the district court is unreported. Terry v. Reno, No. 94-1154(HHG) (D.D.C. Nov. 21, 1995) (App. B & C).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment in this case on December 10, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the Commerce Clause of, and the First, Fifth and Tenth Amendments to, the U.S. Constitution, are set forth in Appendix D. The text of the Freedom of Access to Clinic Entrances (FACE) statute, 18 U.S.C. § 248, is set forth in Appendix E.

STATEMENT OF THE CASE

On May 26, 1994, President Clinton signed into law the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248. That same day, petitioners filed suit challenging the constitutionality of FACE in the United States District Court for the District of Columbia.

Petitioners, Randall A. Terry, Rev. Patrick Mahoney, A. David Henderson, Robert Jewitt, Joseph J. Slovenec, and Rev. James L. Rudd, are outspoken and committed pro-life activists. Petitioners alleged that the threat of enforcement of FACE against petitioners' constitutionally protected but emotionally provocative expressive activities has deterred and chilled petitioners' exercise of their right to free speech and assembly. Petitioners sought declaratory and injunctive relief against FACE both on its face and as construed and threatened to be

applied by federal law enforcement officials.

Petitioners argued that FACE imposes discriminatory, vague, and overbroad restrictions on expressive activity in violation of the First Amendment. Petitioners also argued that FACE exceeds congressional authority and therefore violates the Tenth Amendment.

Respondents are Attorney General Janet Reno and U.S. Attorney Eric Holder, the federal officials charged with enforcement of FACE nationally and in the District of Columbia, respectively. Respondents answered the petitioners' complaint and subsequently moved for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P.

In a memorandum opinion filed on November 21, 1995, the U.S. District Court for the District of Columbia granted respondents' motion for judgment on the pleadings. App. B. "Accepting all well-pleaded facts of plaintiffs' complaint as true," the district court "f[ound] no constitutional violations" in the terms of FACE. App. 26a n.1. The district court entered a judgment order in accord with its opinion. App. C.

Petitioners appealed. On December 19, 1996, a panel of the U.S. Court of Appeals for the District of Columbia Circuit affirmed. App. 1a.

The court of appeals held that FACE fell within congressional authority under the Commerce Clause. App. 5a-13a. Despite this Court's opinion in United States v. Lopez, 115 S. Ct. 1624 (1995), the court below ruled that a federal criminal statute need neither restrict commercial activity, App.

10a, nor contain a jurisdictional element, App. 11a-12a. According to the court of appeals, Congress need only find that the restricted activities, viewed in the aggregate, App. 7a-8a, have a substantial effect on an industry engaged, at least in part, in interstate commerce, App. 6a. "[T]he critical fact," said the court of appeals, was the existence of a "threat to a national market," App. 11a (internal quotation marks, citation, and emphasis omitted), from the regulated noncommercial activities.

The court of appeals also rejected petitioners' First and Fifth Amendment arguments, holding that FACE was not vague, overbroad, or discriminatory. App. 13a-21a. The court specifically ruled that FACE "does not play favorites" because, for example, it would ban both graffiti expressing a pro-abortion viewpoint at a crisis pregnancy center and graffiti expressing an anti-abortion viewpoint at an abortion center. App. 15a.

Petitioners now seek review in this Court.

REASONS FOR GRANTING THE WRIT

I. THE PUBLIC HAS A STRONG INTEREST IN RESOLVING THE CONSTITUTIONALITY OF FACE.

Any serious question about the constitutionality of an Act of Congress deserves review by this Court. This Court frequently reviews the constitutionality of federal statutes without waiting for a split in the appellate courts or for an appellate decision invalidating the statute. For example, there appears to have been no split of appellate authority on the constitutionality of the federal statutes at issue in Denver Area Educ.

Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996); Felker v. Turpin, 116 S. Ct. 2333 (1996); or Colorado Republican Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996). See also City of Boerne v. Flores, 117 S. Ct. 293 (1996) (granting certiorari to review constitutionality of Religious Freedom Restoration Act in absence of circuit conflict).

FACE essentially provides special federal police power protection for one industry: abortion.[2] Furthermore, FACE targets pro-life protesters for uniquely harsh treatment and imposes vague and overbroad restrictions. FACE therefore raises important questions about the scope of Congressional power and the free speech and equal protection implications of this effort by Congress to weigh in on one side of a national controversy. See infra § II.

FACE has been the subject of widespread constitutional controversy, both in the courts[3] and in the scholarly literature.[4]

---

[2]FACE was amended to add certain protection for access to religious facilities. 18 U.S.C. § 248(a)(2), (3). Petitioners are aware of no use of FACE to date to protect places of religious worship. In any event, the religious protection provisions of FACE are not before this Court.

[3]The unconstitutionality of FACE was persuasively demonstrated by the district courts in United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995), rev'd, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996), and in Hoffman v. Hunt, 923 F. Supp. 791 (W.D.N.C. 1996), appeal pending, Nos. 96-1581, 96-1582, 96-1623 (4th Cir. to be argued Apr. 9, 1997), and by Judge Coffey of the Seventh Circuit in dissent in United States v. Wilson, 73 F.3d 675, 689-702 (7th Cir. 1995), cert denied, 117 S. Ct. 46, 47 (1996). Opinions upholding

FACE include: United States v. Scott, 919 F. Supp. 76 (D. Conn. 1996); Planned Parenthood Ass'n of Southeastern Pennsylvania, Inc. v. Walton, 949 F. Supp. 290 (E.D. Pa. 1996); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994), vacated, 74 F.3d 97 (5th Cir. 1996), on remand, No. 94-0980 (W.D. La. Nov. 5, 1996); United States v. Soderna, 82 F.3d 1370 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996); United States v. Wilson, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), cert. denied, 117 S. Ct. 613 (1996); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994); United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995); Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists, 946 F. Supp. 1355 (D. Or. 1996); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

[4]Compare Rose & Osborn, FACE-ial neutrality: A Free Speech Challenge to the Freedom of Access to Clinic Entrances Act, 81 Va. L. Rev. 1505 (1995) (contending FACE violates First Amendment); and Note, About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of Lopez, 11 St. John's J. Legal Commentary 191 (1995) (FACE questionable under Commerce Clause); with Comment, "FACE"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech? 64 U. Cin. L. Rev. 947 (1996) (defending FACE under First Amendment); and Note, "FACE"-ing the Constitution: The Battle over the Freedom of Access to Clinic Entrances Shifts from Reproductive Health Facilities to the Federal Courts, 46 Cath. U.L. Rev. 165 (1996) (defending FACE under Commerce Clause and First Amendment). See also Note, Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248: The Controversy behind the Remedy, 20 Seton Hall Legis. J. 128 (1996) (urging Supreme Court review to resolve constitutional doubts about

As a consequence, the arguments for and against the constitutionality of FACE have been thoroughly developed and are ripe for consideration by this Court.

To those who oppose FACE, whether in principle[5] or in practice, this Act threatens several important interests of constitutional dimension. If FACE is a permissible exercise of Congressional authority, then it is now fair game for any (or all) businesses to seek federalization of laws against trespass, disorderly conduct, vandalism, and the like. And if FACE comports with the rights to free speech and equal protection, then Congress may target other groups -- environmentalist activists, animal rights activists, etc. -- for selectively harsh legislation.

For those who support FACE, meanwhile, the continuing controversy over its constitutionality hampers its use as a criminal and civil litigation tool.

In short, both the public at large and the warring sides of the abortion controversy have a strong interest in the definitive resolution of FACE's constitutional status.

FACE).

[5]One need not oppose abortion to find fault with FACE. See, e.g., Rose & Osborn, supra note 4, at 1505 n.1 (authors disagree on abortion but agree on unconstitutionality of FACE).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN UNITED STATES v. LOPEZ AND RAISES IMPORTANT AND UNSETTLED QUESTIONS OF CONSTITUTIONAL LAW.

The decision below conflicts with this Court's decision in United States v. Lopez, 115 S. Ct. 1624 (1995). Moreover, the case at bar involves important questions of federal constitutional law which have not been, but should be, settled by this Court.

A. FACE Represents a Drastic and Unprecedented Expansion of Congressional Authority under the Commerce Clause, in Conflict with Lopez.

Those courts which, like the court below, have upheld FACE, have ruled that FACE falls within the authority of Congress to regulate interstate commerce. App. 5a-13a. In so doing, however, these courts have legitimized a new and dramatic expansion of congressional commerce power and essentially nullified this Court's decision in Lopez.

The crux of the federal government's case is ultimately the contention that FACE directly prohibits interference with persons because they are engaged in the commercial activity of abortion. The government postulates that this fact provides the requisite nexus with interstate commerce.

The premise of this argument is that Congress has the power to prohibit interference with any business. This proposition, however, overlooks the fact that the Constitution gives Congress power over interstate commerce, not commerce per

se (much less anything affecting commerce). This proposition would give Congress plenary police power over all businesses and all activities affecting businesses -- i.e., all human activity.

The United States Constitution establishes a federal government of limited powers, leaving all remaining powers to the states and to the people. U.S. Const. amend. X. Congress enjoys a range of enumerated powers, including the Commerce Power -- the power to "regulate Commerce . . . among the several States," id. art. I, § 8, cl. 3. This power, while broad, is not so limitless as to justify FACE.

Over the past century, the federal judiciary has approved an ever-more expansive interpretation of congressional power under the Commerce Clause. E.g., Wickard v. Filburn, 317 U.S. 111 (1942) (Congress can regulate production of home-grown wheat as part of national regulatory scheme); Perez v. United States, 402 U.S. 146 (1971) (Congress can prohibit extortionate credit transactions even when conducted intrastate). Nevertheless, there are bounds to federal legislative power. If not, "then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

This Court marked the limits of Commerce Clause power in the recent case of United States v. Lopez, 115 S. Ct. 1624 (1995). In Lopez, this Court held that the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which prohibited the possession of a firearm within 1,000 feet of a school, was "invalid as beyond the power of Congress under the Commerce Clause." 115 S. Ct. at 1626.

The Lopez Court "identified three broad categories of activity that Congress may regulate under its commerce power." Id. at 1629 (citation omitted).

1. "First, Congress may regulate the use of the channels of interstate commerce," id., "for example, the shipment of stolen goods . . . or of persons who have been kidnapped," Perez, 402 U.S. at 150 (citations omitted).

2. "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Lopez, 115 S. Ct. at 1629. This category includes, "for example, the destruction of an aircraft . . . or thefts from interstate shipments," Perez, 402 U.S. at 150 (citations omitted).

3. "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." Lopez, 115 S. Ct. at 1629-30 (citations omitted). This category includes such matters as the regulation of wheat production, Wickard, or milk prices, United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942), and the prohibition of extortionate credit transactions, Perez.

As the court below recognized, "Of the three categories of activity the Court held that Congress could regulate pursuant to its Commerce Clause authority, only the third is relevant to this case . . . ." App. 5a. The court below held that FACE qualifies as a valid enactment under the third Lopez category -- a

regulation of activities that "substantially affect" interstate commerce. App. 9a-13a. This conclusion cannot be squared with Lopez.

Lopez identified the ways in which a statute can "regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." 115 S. Ct. at 1629-30 (citation omitted). FACE, like the Gun-Free School Zones Act, possesses none of these potential nexuses to interstate commerce.

1. Aggregation of commercial activities

Under Lopez, a statute can regulate "intrastate economic activity" (e.g., growing wheat or mining coal) which "substantially affect[s] interstate commerce." Lopez, 115 S. Ct. at 1630 (emphasis added). Protest against abortion, like the possession of a gun in a school zone, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." Id. at 1634 (emphasis added). Likewise, FACE

> is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 1631. In other words, protest and disorderly conduct cannot be analogized to wheat production or milk sales.

2. Jurisdictional element

Second, a statute can regulate noneconomic intrastate activity if the statute contains a "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." Id. at 1631. For example, the federal felony gun possession statute and the federal arson statute explicitly require proof of a nexus to interstate commerce as an element of the offense. See United States v. Bass, 404 U.S. 336 (1971) (felony gun possession); Russell v. United States, 471 U.S. 858 (1985) (arson). FACE, like the Gun-Free School Zones Act, contains no such jurisdictional element.[6]

3. Going beyond Lopez

Because FACE neither regulates an economic activity nor contains a jurisdictional element, FACE apparently exceeds all prior exercises of congressional Commerce Clause authority. As Judge Coffey of the Seventh Circuit observed about FACE, "A federal statute that thus regulates p[u]rely non-commercial activity, while at the same time absent jurisdictional language, is unprecedented." United States v. Wilson, 73 F.3d at 692 (dissent).

The court below sought to avoid the logical conclusion -- that FACE exceeds the constitutional bounds of congressional

---

[6]Congress could easily have chosen to follow the pattern of other federal criminal statutes by adding "in or affecting commerce," or similar language, to FACE. However, Congress chose not to do so. Hence, the constitutionality of a hypothetical amended FACE containing such language is not before this Court.

authority -- by adopting a novel, and deeply flawed, legal principle. The court held that Congress may regulate noncommercial activities (e.g., protest activities), without any jurisdictional language, if the regulated activities, aggregated as a whole, substantially affect an industry which involves, at least in part, interstate commerce. App. 6a-12a..

The implications of this new principle cannot be understated. This holding renders superfluous the jurisdictional language of countless federal statutes. Arson, gun possession by felons, indeed any criminal activity, in the aggregate, will substantially affect businesses which engage in interstate commerce. Hence, according to the court below, the language limiting the scope of these federal crimes to conduct specifically involving interstate commerce is wholly unnecessary. Cf. App. 11a-12a. For the same reason, Congress could pass a federal trespass, vandalism, or disorderly conduct statute (which, essentially, is what FACE represents). In all these cases, the regulated activity, viewed in the aggregate, substantially affects businesses involved in interstate commerce. Cf. App. 13a. Indeed, this principle has no logical limit. Virtually every human activity affects either goods, consumers, or providers which, taken as a whole, involve interstate commerce. If the court below is correct, nothing is beyond the purview of federal legislation under the Commerce Clause. As Judge Kosinski has remarked, "[One] wonder[s] why anyone would make the mistake of calling it the Commerce Clause instead of the `Hey, you-can-do-whatever-you-feel-like Clause.'" Kosinski, Introduction to Volume Nineteen, 19 Harv. J. L. & Pub. Pol'y 1, 5 (1995).

A rationale for Commerce Clause authority cannot be

accepted if the logic of that rationale would largely obliterate the distinction between state and federal power. Lopez, 115 S. Ct. at 1632-34. The Commerce Clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." Id. at 1628-29 (internal quotation marks and citations omitted). For example, the argument that violent crime raises the cost of doing business, and therefore adversely affects commerce, would justify federal regulation of "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." Id. at 1632 (citation omitted). Therefore, that argument cannot justify FACE any more than it could justify the Gun-Free School Zones Act. "[I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." Id.

The court below relied heavily upon congressional findings about the connection between anti-abortion protest and interstate commerce. However, "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Lopez, 115 S. Ct. at 1629 n.2 (internal quotation marks and citation omitted). "Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question . . . ." Id. (editing marks, quotation marks, and citation omitted).

The alleged nexus to interstate commerce which Congress identified -- some goods, staff, or patrons of some abortion facilities cross state lines, and the activities FACE restricts are both widespread and have negative effects on businesses, see App. 6a-8a -- applies with equal or greater force to virtually any business and any tortious or criminal activity.

If FACE is a constitutional exercise of congressional power to regulate interstate commerce, then the federal government has indeed crossed the Rubicon. Congress may, on this theory, regulate non-commercial, intrastate activity with no jurisdictional element tying the activity to interstate commerce.

FACE represents a tremendously significant attempted expansion of congressional power. This Court should grant review and rebuff this expansion as unconstitutional.

B. FACE Imposes Discriminatory, Vague, and Overbroad Restrictions on Expressive Activity.

The conflict with Lopez suffices to warrant review of the present case. But FACE also raises serious First and Fifth Amendment questions. This Court should therefore grant review to settle those constitutional questions as well.

With FACE, Congress consciously singled out the opponents of abortion for selectively harsh treatment. While protesters on other subjects or with other viewpoints receive slaps on the wrist, or even are lionized,[7] exclusively nonviolent

---

[7]See, e.g., "Jackson Freed," USA Today, Feb. 12, 1997, p. 3A (Jesse Jackson only facing charge of disorderly conduct for "blocking access to [a Chicago] construction site" as part of a protest

pro-life demonstrators face a $10,000 fine and six months imprisonment for the first offense; subsequent offenses are felonies. See § 248(b). If FACE passes constitutional muster under the First and Fifth Amendments, then Congress (and the states, despite the Fourteenth Amendment) may likewise target other disfavored political and social movements for special restrictions and penalties.

This selectively harsh legislation, combined with vague and overbroad statutory language, raises important, substantial, and unsettled questions under the First and Fifth Amendment.

1. First Amendment rights are implicated.

There is no question that petitioners' expressive activities implicate First Amendment rights. Pro-life picketing and sidewalk counseling are core First Amendment activities. Schenck v. Pro-Choice Network of Western New York, No. 95-1065 (U.S. Feb. 19, 1996), slip op. at 18. Furthermore, "as a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." Id. at 25 (internal quotation marks, editing marks, and citations omitted).

The First Amendment protects speech on political and social issues even if the speech is "intended to exercise a coercive impact" and is "offensive to others." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). Political expression having the effect of intimidation is constitutionally

---

"for black truckers"; judge releasing Jackson "later shook Jackson's hand").

protected speech. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).[8] Political speech that creates an apprehension of fear is also constitutionally protected. Id. Moreover, if speech is offensive and emotionally unsettling, "that consequence is a reason for according it constitutional protection." Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) (internal quotations marks and citations omitted); Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

Moreover, protection of free speech "does not end at the spoken or written word." Texas v. Johnson, 491 U.S. 397, 404 (1989). The Constitution protects any conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Spence v. Washington, 418 U.S. 405, 409 (1974). See, e.g., Texas v. Johnson (burning a flag); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing of black armband); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (cross burning).

---

[8]As this Court stated over twenty years ago, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969). Only advocacy "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action" is unprotected. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

2. FACE is a viewpoint-based ban on speech.

This Court has held that any viewpoint discrimination against speech is unconstitutional. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). The government may not "impose special prohibitions on those speakers who express views on disfavored subjects," R.A.V., 505 U.S. at 391.

It is abundantly clear that FACE is viewpoint-based, and therefore unconstitutional. In its restrictions on "intimidation," "physical obstruction," blocking of access to medical buildings, or vandalism, FACE targets only those who act "because [a] person is . . . obtaining or providing reproductive health services," Sec. 284(a)(1), or "because [a] facility provides reproductive health services," Sec. 248(a)(3). FACE thus discriminates against anti-abortion protest activity while leaving untouched pro-abortion protests and protests on other subjects.

Indeed, the legislative history is rather explicit on this point:

> Thus, for example, if an environmental group blocked passage to a hospital where abortions happen to be performed, but did so as part of a demonstration over harmful emissions produced by the facility, the demonstrators would not violate this Act (though their conduct might violate some other law, such as local trespass law). In that example, the demonstrators' motive is related to the facility's emissions policy and practices and not to its policy and practices on abortion-related services.

S. Rep. No. 117, 103rd Congress, 1st Sess. 24 (1993) (emphasis added).

Concrete examples further illustrate this lack of viewpoint neutrality. Consider the case of a multi-tenant medical center with three entrances. At one entrance, animal rights activists block the door to halt mistreatment of laboratory animals at a research lab inside the center. At a second entrance, labor union members hold a sit-down strike blocking the door to protest unfair wages for maintenance workers in the center. At a third entrance, anti-abortion activists conduct a "sit-in" to prevent the practice of abortion at a facility inside the center. FACE only applies to the anti-abortion activists. See Sec. 248(a)(1). Consider a freestanding abortion center in an inner-city location. A teenager, outraged that his girlfriend aborted their child, spray paints "DEATH CAMP" on the side of the building. Another teenager, who belongs to a gang called "Warriors," spray paints "WARRIORS RULE" on the same building. FACE only applies to the anti-abortion graffiti writer. See Sec. 248(a)(3). Consider an abortion facility where pro-abortion escorts gather outside in order to hamper anti-abortion "sidewalk counseling." A woman walks up the sidewalk, and an anti-abortion counselor approaches to offer literature and information. A pro-abortion escort then physically blocks the anti-abortion counselor and shoves the counselor aside. The counselor then shoves the escort back. FACE only applies to the anti-abortion counselor. See Sec. 248(a)(1).

This glaringly selective imposition of legal restrictions on the basis of viewpoint clearly violates the First Amendment. For instance, this Court has held that government may forbid all use of public school premises after hours, but may not forbid use only by those who wish to address a topic from a religious

viewpoint. Lamb's Chapel v. Center Moriches Union Free School Dist. Government may forbid all arson in certain locales, but may not forbid only burning a flag to desecrate it. Texas v. Johnson. Government may forbid all trespass and vandalism at facilities, but may not forbid only trespass and vandalism in the name of racial bigotry. R.A.V. v. City of St. Paul. Government may forbid all targeted, single-residence residential picketing, Frisby v. Schultz, 487 U.S. 474 (1988), but may not forbid only nonlabor residential picketing. Carey v. Brown, 447 U.S. 455 (1980). See also Schacht v. United States, 398 U.S. 58, 62-63 (1970) (invalidating a law that allowed wearing military uniforms only in dramatic portrayals that did not "tend to discredit" the military). FACE violates the basic constitutional principle of neutrality, "which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).[9]

It is true that FACE also would proscribe pro-abortion blockades at pro-life pregnancy centers. But to say that FACE is viewpoint-neutral because it covers this counterfactual, hypothetical scenario is like saying a ban on pollution-related protests is viewpoint-neutral because it would also ban pro-pollution protests. Such an argument is plainly pretextual.

---

[9]This principle finds embodiment both in the free speech guarantee of the First Amendment and in the right to equal protection under the Fifth and Fourteenth Amendments. See R.A.V., 505 U.S. at 384 n.4; Police Dep't v. Mosley, 408 U.S. 92 (1972); Carey v. Brown.

More fundamentally, the pregnancy center hypothetical simply shows that FACE's viewpoint-discrimination can apply in other settings beyond abortion facilities. At pregnancy centers, environmental protesters, labor protesters, and supporters of the center are not covered, while pro-abortion protesters are. Thus, whether at an abortion center or at a crisis pregnancy center, FACE targets one particular viewpoint -- namely, those opposing the center's abortion (or pregnancy aid) practice -- thereby unconstitutionally "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." R.A.V., 505 U.S. at 392.[10]

3. FACE is unconstitutionally vague and overbroad.

FACE also suffers from unconstitutional vagueness and overbreadth.

"First Amendment freedoms need breathing space to survive." NAACP v. Button, 371 U.S. 415, 433 (1963). As a result, "the First Amendment recognizes that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." City of Houston v. Hill, 482 U.S. at 472. When a law lacks clearly defined prohibitions,

---

[10]The addition to FACE of language that extends its prohibitions and punishments to unlawful protest activities at places of religious worship, as well as at abortion facilities, does not redeem the law. Sec. 248(a)(2) and (3). A law penalizing two viewpoints is no less unconstitutional than a law penalizing just one viewpoint. See R.A.V. (ordinance applied to religious bigotry as well as racial bigotry).

that law unconstitutionally threatens speech through the twin vices of vagueness and overbreadth. FACE is both vague and overbroad.

a. vagueness

The text of FACE -- set forth in an appendix --raises a host of interpretive difficulties that engender unconstitutional vagueness, as well as overbreadth.

-- "Force or Threat of Force": Does this include a nonviolent "sit-in"? Calling someone a murderer? Warning someone that he may go to Hell? Sec. 248(a)(1).

-- "Physical Obstruction": What does it mean to render passage to or from a facility "unreasonably difficult"? Sec. 248(e)(4). Is it "unreasonably difficult" to walk through a picket line? Be forced to walk around a persistent sidewalk counselor? Step over people engaged in a "sit-in"? Wait twenty minutes while police arrest participants in a "rescue" blockade?[11]

-- "Injures": FACE says "injures" in section 248(a) but elsewhere refers to "bodily injury," Sec. 248(b). Therefore, the verb "injures" standing alone apparently includes causing other, non-bodily injuries. Does this include any legal injury?

---

[11]This Court has held that the Constitution affords persons the opportunity to win the attention of the listener. Kovacs v. Cooper, 336 U.S. 921 (1949). If "physical obstruction" means merely being forced to walk around a pro-life leafletter, it is plainly unconstitutional. Lee v. ISKCON, 505 U.S. 830 (1992) (ban on leafletting in airport terminal violates First Amendment).

Emotional injury? Injury to constitutional rights?

-- "Intimidates": The phrase "reasonable apprehension of bodily harm to him- or herself or to another" opens up a range of possible meanings. Sec. 248(e)(3). If FACE had defined "intimidate" to mean "to place a person in reasonable apprehension of imminent bodily harm from the actor to him or herself," it would approximate the concept of assault. See 6 Am. Jur. 2d Assault and Battery § 3 (1963). FACE, however, departs markedly from this concept: first, the threatened harm need not be imminent; second, the threatened harm need not come from the person allegedly violating FACE; third, the threatened harm may be to another person other than the one in reasonable apprehension of the harm.

These features of FACE yield a drastically broadened concept of "intimidation." FACE criminalizes anti-abortion "threats" if they "intimidate" by placing another person in reasonable apprehension of harm sometime to someone from something.

The breadth of this definition is astonishing. Warning any listener of the physical perils of abortion will, if persuasive, likely induce reasonable apprehension of bodily harm to those seeking abortion. Merely saying, "If you (or your friend, wife, daughter, etc.) have an abortion, you may die (or become sterile, hemorrhage, get infections, get breast cancer, etc.)" could, especially if backed up with medical statistics or personal accounts, induce "reasonable apprehension of bodily harm" to someone. True, the apprehension comes from the medical information. True, the harm feared may or may not be imminent. True, the harm feared would come from the

abortion, not the sidewalk counselor. True, the harm may be to someone else. But FACE takes none of these factors into consideration. "Threatening" the medical harms of abortion triggers the literal language of FACE.

-- "Interfere With": FACE defines this term as "restrict[ing] a person's freedom of movement." Sec. 248(e)(2). But by merely existing and occupying space, everyone necessarily "restricts the freedom of movement" of everyone else by diminishing the space available for movement. While a literal interpretation of this text is clearly absurd, where is the line to be drawn?

The vagueness of FACE has terribly grave practical significance. Those who wish lawfully to distribute literature or speak to passersby about abortion alternatives must act at their peril when present outside abortion facilities. Indeed, this problem is multiplied by the sheer enormity of the penalties attached to guessing wrongly -- up to six months in prison for a single nonviolent violation and eighteen months (i.e., a felony) for second or subsequent nonviolent offenses, to say nothing of civil remedies and attorneys fees. Sec. 248 (b) and (c). Compounding this problem is the fundamental bias of FACE: this one-way statute weighs down only upon anti-abortion activities, removing the moderating influence that would result from equal applicability of the legal norms.

b. overbreadth

FACE's overbreadth is amply illustrated in the preceding section.

FACE is also overbroad because it is not geographically limited. It purports to protect access to abortion facilities because of problems arising at those locations, yet restricts communicative activities without regard to any proximity to such facilities. E.g., Lucero v. Trosch, 904 F. Supp. 1336 (S.D. Ala. 1995) (FACE civil suit predicated on remarks made on "Geraldo" TV show). Nor is FACE limited temporally, i.e., to interference with specific, impending abortions. Id.

Given the extraordinary penalties and civil remedies available to punish violations, FACE doubtless has a severe chilling effect on entirely lawful (indeed, constitutionally protected) anti-abortion expression at abortion facilities. In this context, the substantial overbreadth of FACE's prohibitions render it unconstitutional. See Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 574 (1987); Houston v. Hill, 482 U.S. at 458-59; New York v. Ferber, 458 U.S. 747, 769 (1982).

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Jay Alan Sekulow
(Counsel of Record)
James M. Henderson, Sr.
Mark N. Troobnick
Walter M. Weber
American Center for Law & Justice
1000 Thos. Jefferson St. N.W.
Suite 609
Washington, DC 20007
(202) 337-2273

Thomas P. Monaghan
Francis J. Manion
The New Hope Life Center, ACLJ-New Hope
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

John G. Stepanovich
American Center for Law & Justice
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 579-2489

Attorneys for Petitioners

March 10, 1997

APPENDICES

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 7, 1996 Decided December 10, 1996

No. 95-5419

RANDALL A. TERRY, ET AL.,
APPELLANTS

v.

JANET RENO, ATTORNEY GENERAL OF THE
UNITED STATES OF AMERICA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01154)

Mark N. Troobnick argued the cause for appellants. With him on the brief were *Jay A. Sekulow, Colby M. May* and *James M. Henderson, Sr.*

Sushma Soni, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Frank W. Hunger,* Assistant Attorney General, *Eric H. Holder, Jr.,* U.S. Attorney, and *Mark B. Stern,* Attorney.

Celeste Lacy Davis and *John Vanderstar* were on the brief for intervenor-appellees.

Before: WILLIAMS, SENTELLE and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: In this case, anti-abortion protesters challenge the constitutionality of the Freedom of Access to Clinic Entrances Act. Enacted in 1994, that statute prohibits the use or threat of force or physical obstruction against a

person seeking to obtain or provide reproductive health services, including abortions. Agreeing with the district court and joining four of our sister circuits, we sustain the constitutionality of the Access Act. Because the legislative record contains sufficient findings to conclude that violent and obstructive protest activities substantially affect interstate commerce in reproductive health services, Congress did not exceed its commerce power in enacting the statute. The Access Act also does not violate the First Amendment. It prohibits conduct, not speech, and its prohibition is narrowly tailored to further the Government's legitimate interest in providing safe access to reproductive health services.

I

Reacting to a nationwide pattern of blockades, vandalism, and violence aimed at abortion clinics and their patients and employees, Congress enacted the Freedom of Access to Clinic Entrances Act. 18 U.S.C. § 248 (1994). Referred to throughout this opinion as the Access Act, the statute provides:

> (a) Prohibited Activities.--Whoever--
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with . . . any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
>
> . . . .
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . .

> shall be subject to [criminal penalties and civil remedies], except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

18 U.S.C. § 248. According to the Access Act's rules of construction, nothing in it "shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to "the Constitution . . . ." *Id.* § 248(d)(1). The statute also defines the terms "interfere with," "intimidate," "physical obstruction," and "reproductive health services." *Id.* § 248(e)(2)-(5). "Physical obstruction," for example, means "rendering impassable ingress to or egress from a facility that provides reproductive health services . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." *Id.* § 248(e)(4). Criminal penalties under the Access Act vary depending on whether the offense was nonviolent or violent, and whether the offender was a first-time violator or a repeat offender. *Id.* § 248(b).

On May 26, 1994, the day the President signed the Access Act into law, appellants filed suit in the United States District Court for the District of Columbia challenging the constitutionality of the Act both on its face and "as applied or threatened to be applied" to them. Appellants are anti-abortion activists from New York, Virginia, Ohio, and the District of Columbia, whose protest activities take place in the District of Columbia and elsewhere in the United States. Compl. at 3-5. Appellants picket abortion clinics, distribute literature, offer "sidewalk counseling" to women entering abortion facilities, and lead anti-abortion protesters in public prayer and slogan

chanting. *Id.* at 6-9. Several appellants participated in "sit-ins," which "did have the effect, temporarily, of interfering with and blocking access to abortion facilities." *Id.* at 9. According to five of the six appellants, protesting against abortion "serves a higher and more compelling purpose than that served by traditional laws against trespass and blocking access to abortion facilities." *Id.* at 8.

The district court granted the Government's motion for judgment on the pleadings pursuant to FED. R. CIV. P. 12(c). Finding that the statute "'protects and regulates commercial enterprises operating in interstate commerce,'" the court ruled that Congress had the power to enact the statute under the Commerce Clause. *Terry v. Reno,* Civ. No. 94-1154, slip op. at 11 (D.D.C. Nov. 21, 1995) (quoting *Cheffer v. Reno,* 55 F.3d 1517, 1520 (11th Cir. 1995)). Relying on *American Life League, Inc. v. Reno,* 47 F.3d 642 (4th Cir.), *cert. denied,* 116 S. Ct. 55 (1995), the district court held that because the Access Act was viewpoint-neutral and narrowly tailored to further substantial government interests, it did not violate the First Amendment. *Terry,* slip op. at 5-8. The district court also ruled that the Act did not violate principles of due process or equal protection, that it did not violate the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (1994), and that plaintiffs' Eighth Amendment claims were not ripe for review. *Id.* at 9-13.

In their "Statement of the Issues," appellants list nine challenges to the Access Act. Appellants' Br., at vi. By failing to brief five of these challenges, they have waived them. *See* FED. R. APP. P. 28(a)(6); *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n,* 485 F.2d 786, 790 n.16 (D.C. Cir. 1973) (where petitioners offer "no argument

whatever" in support of certain issues on appeal, court will decline to consider them). Rule 28(a)(6) requires that the argument section of an appellate brief "contain the contentions of the appellant on the issues presented, and the reasons therefor . . . ." FED. R. APP. P. 28(a)(6). Simply listing the issues on review without briefing them does not preserve them. *Cratty v. United States*, 163 F.2d 844, 851 (D.C. Cir. 1947) (where certain grounds for appeal are "stated by the appellants but not urged in their brief," they are treated as abandoned). We therefore address only the arguments appellants have briefed: that the Access Act exceeds Congress's commerce power; that it abridges appellants' First Amendment rights; that it violates the Equal Protection Clause; and that the district court erred in granting the Government's motion for judgment on the pleadings.

II

Appellants' Commerce Clause challenge rests on the Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995). There, the Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1994), which made possession of a gun within a school zone a federal offense. Of the three categories of activity the Court held that Congress could regulate pursuant to its Commerce Clause authority, only the third is relevant to this case: Congress can regulate activities if it has a rational basis for concluding that they "substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630. The *Lopez* Court found that possession of guns within school zones was not commercial in nature, that the statute did not contain a jurisdictional element to ensure on a case-by-case basis that the gun in question was connected with interstate commerce, and that Congress had made no findings

about the effect gun possession in school zones has on interstate commerce. *Id.* at 1630-32. The Court then considered and rejected the Government's arguments, developed only after the statute's constitutionality was challenged in court, linking the possession of guns near schools to interstate commerce. *Id.* at 1632-33. Because it could not conclude that Congress had a rational basis for finding that gun possession within school zones had a substantial effect on interstate commerce, the Court declared the statute unconstitutional. *Id.* at 1634.

Lopez's impact on the limits of the commerce power is a hotly debated issue. Because the Access Act does not test those limits, we need not enter that fray. Indeed, we can begin where the *Lopez* Court could not—with congressional findings regarding the effect on interstate commerce of anti-abortion violence and blockades of abortion clinics.

Although no interstate commerce findings appear in the text of the statute, we consider "even congressional committee findings" regarding the effect on interstate commerce of the regulated activity. *Lopez*, 115 S. Ct. at 1631; *see, e.g.*, *Preseault v. ICC*, 494 U.S. 1, 17 (1990) (citing House Report in discussion of congressional findings regarding effect on interstate commerce of federal "rails-to-trails" statute). The Senate Committee on Labor and Human Resources, which held hearings on anti-abortion violence and drafted the bill that ultimately became the Access Act, concluded that for several reasons abortion clinics do engage in interstate commerce: they obtain medical equipment and supplies through interstate commerce, they treat patients who travel interstate to obtain services, their employees travel interstate, and they own and lease office space and generate income. S. REP. NO. 103-117, at 31 (1993).

Having concluded that abortion clinics engage in interstate commerce, the Committee also documented the effect violent and disruptive anti-abortion protest activities have on clinics and their operations. According to the Senate Report:

> A nationwide campaign of anti-abortion blockades, invasions, vandalism and outright violence is barring access to facilities that provide abortion services and endangering the lives and well-being of the health care providers who work there and the patients who seek their services. This conduct is interfering with the exercise of the constitutional right of a woman to choose to terminate her pregnancy, and threatens to exacerbate an already severe shortage of qualified providers available to perform safe and legal abortions in this country.

Id. at 3. The Report chronicled escalating violence against abortion providers and clinics, including eighty-four assaults, thirty-six bombings, eighty-one arsons, seventy-one chemical attacks, 131 death threats, two kidnappings, 327 clinic invasions, over 6,000 blockades, and—as of 1993—one murder. *Id.* at 3-11. According to the Committee, protester violence and blockades forced temporary or permanent closure of abortion facilities, causing doctors to refuse to perform abortions and producing a scarcity of both clinics and physicians. *Id.* at 14-17. The number of doctors providing abortion services declined in thirty-four states between 1985 and 1988. *Id.* at 17 n.29. Some doctors traveled to several states, some for hundreds of miles, to perform abortions at clinics which had no physicians of their own. *Id.* at 31 & n.46. Patients, too, sometimes traveled hundreds of miles to obtain abortions, either within their states or at clinics in other states. *Id.* at 31. The Committee also found that in some rural areas,

arson and chemical attacks had forced medical clinics to stop providing not only abortions, but other reproductive services as well, including pre- and post-natal care. *Id.* at 5-6.

According to the Committee, some anti-abortion organizations engaged in concentrated nationwide campaigns against abortion clinics and physicians providing abortions. *Id.* at 11-14. Relying on statements of those groups' leaders, the Committee concluded that clinic blockades, threats against employees, and other violent and obstructive activities have a single goal: to eliminate the practice of abortion by closing abortion clinics. *Id.* at 11.

Although this legislative record amply supports Congress's finding that the activities of anti-abortion activists affect interstate commerce, this conclusion does not end our analysis; *Lopez* holds that the effect on interstate commerce must be "substantial." *Lopez*, 115 S. Ct. at 1630. As the Court acknowledged, the standard was not always so demanding: "[O]ur case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it . . . ." *Id.* In one case, the Court described the standard this way:

> The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964), and *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964)); *see also Preseault*,

494 U.S. at 17 ("[W]e must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.'" (quoting *Hodel*)).

We think it obvious that Congress's failure to use the magic word "substantial" is not fatal to the statute's constitutionality. For one thing, since Congress passed the Access Act prior to *Lopez*, it understandably did not find that activities proscribed by the statute "substantially" affect interstate commerce; it simply found that those activities "affect" interstate commerce. S. REP. NO. 103-117, at 31. Moreover, if Congress "normally is not required to make formal findings" as to the burdens that particular activities place on interstate commerce, *Lopez*, 115 S. Ct. at 1631, then Congress surely need not make formal findings that the activities "substantially" affect interstate commerce. Just as we can examine the legislative history to assure ourselves that Congress made findings regarding the impact of anti-abortion activities on interstate commerce, *supra* at 6-7, we can, as appellants' counsel conceded at oral argument, examine those findings to assure ourselves that the impact is substantial. In light of the Senate Report's detailed review of the effect violent and obstructive anti-abortion protest has had upon the availability of abortions nationwide, we have no doubt that Congress found the impact of such activities on interstate commerce to be substantial.

Appellants argue that the Access Act regulates not abortion clinics, but *protest* against abortion clinics, and that Congress may not regulate protest under the Commerce Clause. Although two circuits have found that the Act does in fact regulate the provision of reproductive health services, *United States v. Wilson*, 73 F.3d 675, 683 (7th Cir. 1995) (Act regulates provision of health services "by preventing its

obstruction"), *cert. denied*, 117 S. Ct. 47 (1996); *Cheffer v. Reno*, 55 F.3d at 1520 (unlike statute challenged in *Lopez*, Access Act "does regulate commercial activity, the provision of reproductive health services"), we need not address that issue. As counsel conceded at oral argument, Congress has authority to regulate "*activities* that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630 (emphasis added). The regulated activity—in this case, interfering with abortion clinics—need not be commercial, so long as its effect on interstate commerce is substantial. As the Supreme Court said in a different context, "An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives." *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 804 (1994). Like the Eleventh Circuit, we find no support for "the proposition that Congress' Commerce Clause authority extends only to the regulation of commercial actors, and not private individuals who interfere with commercial activities in interstate commerce." *Cheffer*, 55 F.3d at 1520 n.6; *see also United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996) (same), *petition for cert. filed* (U.S. Aug. 16, 1996) (No. 96-5615); *Wilson*, 73 F.3d at 684-85 (same).

We can quickly dispose of appellants' remaining Commerce Clause challenges. Although they may be correct that, by itself, interstate travel by patients and staff is insufficient to justify finding that clinic operations affect interstate commerce, their reliance on *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), is misplaced. *Bray*'s holding that anti-abortion protest does not implicate the constitutional right to interstate travel, *id.* at 762-63, is irrelevant to the inquiry in this case, i.e., whether patients in fact travel interstate to obtain abortions. In fact, the *Bray* Court's implicit acceptance of the district court's

findings that substantial numbers of women traveled interstate to have abortions reinforces the congressional findings underlying the Access Act. *Id.* at 762. In any event, travel by patients and staff was not the Committee's only finding regarding whether abortion clinics operate in interstate commerce. The Committee also found that clinics purchase equipment and supplies in interstate commerce, own and lease office space, and generate income. S. REP. NO. 103-117, at 31. Combined with such findings, the interstate travel of patients and staff supports the conclusion that the Access Act does not exceed Congress's Commerce Clause power.

Appellants' argument that the "decrease in the number of abortions" is insufficient to justify the statute ignores the critical fact: the marked decrease in the *availability* of abortions nationwide, a decrease Congress attributed both to the forced closure of clinics by blockades or violence, and to the decreasing number of physicians willing to perform abortions because of protesters' threats. "It is this *threat to a national market,*" the Seventh Circuit observed, "which Congress found to be scarce and declining in availability, that distinguishes Congress's authority to regulate in this case from its probable lack of authority to regulate, for example, shoplifting . . . ." *Wilson,* 73 F.3d at 682 (emphasis added).

Aside from their unsuccessful challenges to the congressional findings, appellants' only other Commerce Clause argument is that the Access Act is invalid because it lacks a jurisdictional element. We do not view *Lopez* as holding that federal criminal statutes must contain jurisdictional elements. If a jurisdictional element were critical to a statute's constitutionality, the Court in *Lopez* would not have gone on to examine the Government's proffered rationales for the

constitutionality of the gun possession statute. *See Lopez*, 115 S. Ct. at 1632-34. *Lopez*'s fundamental proposition is that Congress must ensure that its Commerce Clause power to regulate non-commercial activities extends to only those activities that substantially affect interstate commerce. Congress may do so either through its own legislative findings or by including a jurisdictional element in the statute; it need not do both. Where, as here, detailed congressional findings support the conclusion that the activities prohibited by the Access Act substantially affect interstate commerce, the absence of a jurisdictional element is not fatal to the statute's constitutionality. *See Wilson*, 73 F.3d at 685 ("In discussing the lack of a jurisdictional element in *Lopez*, the Court simply did not state or imply that all criminal statutes must have such an element, or that all statutes with such an element would be constitutional, or that any statute without such an element is per se unconstitutional.").

In concluding that the Access Act satisfies *Lopez*, we think it significant that the statute fundamentally differs from the statute struck down in *Lopez*. The Access Act prohibits activities—force, threats, physical obstruction of access to or from reproductive health facilities, and physical damage to those facilities. The statute invalidated in *Lopez* did not prohibit active interference of this sort, but rather simple possession of a gun near a school. This difference is telling. As the Court explained in *Lopez*, in order to justify the constitutionality of prohibiting gun possession near schools, the Government had to engage in several multi-step analyses to link gun possession to interstate commerce: (1) gun possession near schools leads to gun use, which in turn leads to violent crime, which in turn imposes substantial costs on society, which in the end affects interstate commerce; and (2) gun possession near schools

threatens the educational environment, which hampers the educational process, which creates a "less productive citizenry," which adversely affects "the Nation's economic well-being," and which in the end adversely affects interstate commerce. *Lopez*, 115 S. Ct. at 1632. In the case before us, the chain connecting the prohibited activity and interstate commerce contains only one link: violent and obstructive activity outside abortion clinics adversely affects interstate commerce in reproductive health services. In enacting the Access Act, Congress did not exceed its Commerce Clause power.

III

We turn to appellants' First Amendment challenges to the Act. Applying long-standing Supreme Court precedents, we find the statute compatible with the First Amendment.

To begin with, the Access Act does not target protected speech. It prohibits three types of conduct: use of force, threat of force, and physical obstruction. In this sense, the Access Act is virtually identical to the statute upheld in *United States v. O'Brien*, 391 U.S. 367 (1968), which also punished conduct—the destruction of draft cards. Moreover, the Supreme Court has ruled that the Government can punish all three types of conduct covered by the Access Act without running afoul of the First Amendment. The first, physical assault, "is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). Threats are not protected speech either. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994) ("Threats to [clinic] patients or their families, however communicated, are proscribable under the First Amendment."). Consistent with the First Amendment, the Government may also punish physical obstruction that makes

passage to or from a reproductive health facility impossible or unreasonably hazardous. *Cameron v. Johnson*, 390 U.S. 611, 617 (1968). Protesters have no First Amendment right to "cordon off a street, or [the] entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Going "beyond protest," such activity "invade[s] property rights." *United States v. Soderna*, 82 F.3d 1370, 1375 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3086 (July 26, 1996) (No. 96-141). *O'Brien*, *Mitchell*, *Madsen*, and *Cox* thus squarely govern this case.

That conduct prohibited by the Access Act might have expressive value, such as in the case of sit-ins which "temporarily . . . interfer[e] with and block[ ] access to abortion facilities," *see* Compl. at 9, does not alter our conclusion regarding the Act's constitutionality. Congress may regulate conduct with expressive content without running afoul of the First Amendment if the legislation "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The Access Act meets this standard.

The statute furthers several important government interests, not the least of which are ensuring access to lawful health services and protecting the constitutional right of women seeking abortions and other pregnancy-related treatment. As in *O'Brien*, the Government's interest is unrelated to the suppression of free expression. The statute at issue in *O'Brien* prohibited destroying draft cards, not destroying draft cards by anti-war protesters. Here the statute prohibits interfering with

reproductive health services, not interfering with those services by anti-abortion demonstrators. The statute therefore "condemns only the independent noncommunicative impact of conduct within its reach." *Id.* at 382. Moreover, the Act protects individuals providing and obtaining "reproductive health services," not just abortions. The statute defines "reproductive health services" to include "medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. § 248(e)(5). The Access Act thus does not play favorites: it protects from violent or obstructive activity not only abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion. *See Riely v. Reno*, 860 F. Supp. 693, 702 (D. Ariz. 1994) (Access Act "would apply to an individual who spray paints the words 'KEEP ABORTION LEGAL' on a facility providing counseling regarding abortion alternatives as well as to the individual who spray paints the words 'DEATH CAMP' on a facility providing abortion services."). Because the Act criminalizes only violent or obstructive conduct against reproductive health facilities or those seeking to obtain or provide reproductive health services, the views of those arrested for committing violence against or obstructing people obtaining or providing reproductive health services are irrelevant.

That the majority of those whose conduct the statute punishes probably oppose abortion does not call the statute's neutrality into question. In *O'Brien*, the Court upheld a law prohibiting willful destruction of draft cards even though most people destroying their draft cards opposed the Vietnam War. There is, after all, "no disparate-impact theory in First Amendment law." *Dinwiddie*, 76 F.3d at 923. Appellants

"cannot obtain constitutional immunity from prosecution by violating a statute more frequently than any other group." *Soderna*, 82 F.2d at 1376 (citing *Madsen*, 114 S. Ct. at 2523-24).

The Access Act survives *O'Brien*'s third inquiry: the statute is narrowly tailored to further the Government's interests. As the Eighth Circuit put it in *Dinwiddie*, the statute merely "forbids physical interference with people going about their own lawful private business." *Dinwiddie*, 76 F.3d at 924. The Act also leaves open ample alternative means for communication: "In a non-violent, non-obstructive manner, protestors may still stand outside reproductive health facilities and express their anti-abortion message. They may still proclaim their views and make their pleas by voice, signs, handbills, symbolic gestures and other expressive means." *American Life League*, 47 F.3d at 652 (footnote omitted).

Our conclusion that the Access Act satisfies the *O'Brien* test might be different if, notwithstanding the Act's clear focus on conduct, the Government were using it to prosecute appellants for their First Amendment activity. But this is not such a case. Appellants' complaint does not allege that defendants applied the Act to them or their protest activities, nor have they amended the complaint to include such allegations. Indeed, they filed their complaint on the day the Access Act was signed into law.

The statute's motive requirement—that a person violates the Act by engaging in proscribed conduct "because" a person is obtaining or providing reproductive health services—is not, as appellants claim, fatal to its constitutionality. Again, *Wisconsin v. Mitchell* controls. The statute at issue in that case enhanced the sentence for aggravated battery if the aggressor

"'intentionally select[ed]'" his victim on the basis of his "'race, religion, color, disability, sexual orientation, national origin or ancestry . . . .'" *Mitchell*, 508 U.S. at 480 (quoting Wis. Stat. § 939.645(1)(b) (1989-1990)). The Wisconsin Supreme Court had invalidated the statute because, in its view, the law criminalized bigoted thought—it "'punishe[d] the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection.'" *Id.* at 482 (quoting *Mitchell v. Wisconsin*, 485 N.W.2d 807, 812 (1992)). Reversing, the Supreme Court found that motive "plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws," which the Court has consistently upheld against constitutional challenge. *Mitchell*, 508 U.S. at 487 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (no First Amendment right to discriminate in membership of charitable organization on basis of sex in violation of state antidiscrimination law); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (no First Amendment right to discriminate in hiring on basis of sex in violation of Title VII); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (no First Amendment right to discriminate on basis of race in selecting who may attend a private school)). The *Mitchell* Court distinguished the ordinance invalidated in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), from the Wisconsin statute it upheld, pointing out that the former explicitly targeted expression—"'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender'"—while the Wisconsin statute targeted conduct unprotected by the First Amendment. *Mitchell*, 508 U.S. at 487. Nothing distinguishes the case before us today from *Mitchell*. Like the statute in *Mitchell*, the Access Act targets not expression, but conduct. As the Court recognized in *R.A.V.*, "here the government does

not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V.*, 505 U.S. at 390. The Act's motive requirement, as with similar requirements in other federal statutes, *see, e.g.*, 42 U.S.C. § 3631 (1994) (Fair Housing Act provision prohibiting use or threat of force against person because he or she participates in certain housing programs); 42 U.S.C. § 1971(b) (1994) (Voting Rights Act provision stating that no person shall threaten another for the purpose of interfering with his or her right to vote), does not make the Access Act an instrument for the suppression of speech. It merely narrows the Act's reach.

Remaining are appellants' claims that the Access Act is overbroad and vague. A statute is overbroad only if "it reaches a substantial number of impermissible applications." *New York v. Ferber*, 458 U.S. 747, 771 (1982); *see City of Houston v. Hill*, 482 U.S. 451, 458 (1987) ("Only a statute that is substantially overbroad may be invalidated on its face."). Contrary to appellants' argument, the Access Act prohibits only a narrow range of conduct: the use or threat of force, or nonviolent physical obstruction, intended to prevent access to or the provision of reproductive health services. Moreover, the statute contains language barring its application to expressive conduct protected by the First Amendment, such as picketing or other peaceful demonstration. 18 U.S.C. § 248(d)(1). Appellants suggest two allegedly impermissible applications of the statute:

> [The Access Act] criminalizes 'threats' that the person who is uttering the 'threat' will harm *himself* if another person obtains or provides an abortion. Sec. 248(e)(3) (definition of 'intimidate'). [The Access Act] therefore criminalizes a

> genuine threat to go on an extended 'hunger strike'—i.e., risk 'bodily harm' to oneself—if another person obtains or provides an abortion. Under section 248(a)(1) and (e)(3), such a 'threat' would constitute criminal intimidation because it would 'place a person in reasonable apprehension of bodily harm . . . *to another.*' [The Access Act's] definition of 'intimidation' would also include the 'harm' of increased medical risk—a harm abortion advocates claim is inherent in *any* delay or denial of abortion (even by voluntary choice of childbirth).

Appellants' Br., at 37. When judged in relation to the statute's plainly legitimate sweep," neither of these examples renders the statute overbroad. *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973).

We are equally unpersuaded by appellants' vagueness challenge. A statute is unconstitutionally vague if it does not give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). In arguing that the terms "interfere with" and "intimidate" are vague, appellants ignore the statute's explicit definition of these terms. "Interfere with" means "to restrict a person's freedom of movement." 18 U.S.C. § 248(e)(2). "Intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." *Id.* § 248(e)(3). Because the Supreme Court has held that the term "'unreasonably interfere' plainly require[s] no 'guess[ing] at [its] meaning,'" *Cameron,* 390 U.S. at 616, we fail to see how the term "interfere with," confined as it is by the narrow definition in the statute, could possibly be vague. We agree with the Fifth Circuit, moreover, that the term "intimidate" is "obviously widely used and commonly understood in statutory

contexts." *CISPES v. FBI*, 770 F.2d 468, 477 (5th Cir. 1985); *see also United States v. Gilbert*, 813 F.2d 1523, 1530 (9th Cir.) (rejecting vagueness challenge to Fair Housing Act, 42 U.S.C. § 3631, which prohibits the use or threat of force to "injure, intimidate, or interfere with" a person because he or she is participating in certain housing programs), *cert. denied*, 484 U.S. 860 (1987); *Dinwiddie*, 76 F.3d at 924 (definition of "intimidate" in Access Act similar to that of an element in crime of assault). While "the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question,'" *Grayned*, 408 U.S. at 110 n.15 (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950)), the Access Act defines its terms narrowly and in clearly understandable language.

Protest, picketing, and other like activities lie at the core of free speech guaranteed by the First Amendment. For decades, courts have protected such forms of protest, regardless of the popularity of the protesters or their cause. Because this case is about only whether Congress can protect clinics engaged in the lawful provision of reproductive health services from physical disruption, our decision does not signal a weakening of those First Amendment protections.

IV

Buried in one sentence of appellants' brief is their argument that the Access Act violates the Fifth Amendment's equal protection guarantee. According to appellants, since the statute allows labor but not anti-abortion picketing, it limits a particular form of social protest. Because anti-abortion activists are not a suspect class, and because the Access Act infringes upon no constitutionally protected rights, *see* Part III *supra*, we ask only whether Congress had a rational basis for prohibiting violent or

obstructive acts committed with intent to interfere with the provision of lawful medical services. For the same reasons that the Access Act survives appellants' First Amendment challenges, it clearly passes this more deferential test.

V

We turn finally to appellants' argument that the district court should not have granted the Government's Rule 12(c) motion because outstanding questions of fact precluded judgment on the pleadings. Specifically, they claim that the district court disregarded evidence that the Government has interpreted the Access Act to "proscribe[ ]" protesting, picketing, leafletting, singing, chanting, and the like, and that the Attorney General has attempted to enjoin anti-abortion protesters from engaging in those activities near abortion clinics. This argument ignores the Government's answers to appellants' requests for admission, where the Government stated, under oath, that none of appellants' First Amendment activities violates the Access Act.

Appellants' argument also comes perilously close to misstating the record. In one of the cases they rely on to support their claim that the Government is using the Access Act to punish First Amendment activity, the Government filed suit against several anti-abortion protesters who had stalked and threatened clinic employees and who had welded themselves inside cars blocking access to an abortion clinic. *United States v. Lindgren*, No. A3-95-4 (D.N.D. complaint filed Jan. 18, 1995). That complaint targeted neither speech nor picketing. Moreover, the remedy the Government sought—a 200-foot buffer zone around the clinic and its employees—was intended to protect protesters' First Amendment rights while also protecting the constitutional right to an abortion. *Id.* at 9-10.

In each of the other three cases appellants rely on, the Government prosecuted not speech, but only violent or disruptive conduct: blocking access to a clinic by welding protesters inside cars parked against clinic doors, *Milwaukee Women's Med. Serv's., Inc. v. Brock*, Civ. No. 94-C-0793 (E.D. Wis. complaint in intervention filed Dec. 20, 1994) at 3; and threatening, stalking, and assaulting clinic employees, *United States v. Smith*, No. 74:95CV-0025 (N.D. Ohio complaint filed Jan. 4, 1995) at 3-6, *United States v. Dinwiddie*, No. 95-1101-CV-W-8 (W.D. Mo. complaint filed Jan. 1995) at 2. In each case, the requested relief included buffer zones tailored to specific violations of the Access Act. *See Smith*, Compl. at 7-8 (requesting injunctive relief including 50-foot buffer zone around clinic and 25-foot buffer zone around doctor's home); *Brock*, Compl. at 5 (seeking injunctive relief including 50-foot buffer zone around clinic); *Dinwiddie* (W.D. Mo. temporary restraining order filed Jan. 6, 1995) at 7 (temporarily restraining defendant from locating within 500 feet of any reproductive health facility within court's jurisdiction). *See generally Madsen*, 114 S. Ct. at 2527-28 (upholding reasonably circumscribed buffer zones as remedy for violations of the law by anti-abortion protesters). The cases relied on by appellants thus fall far short of showing that the Government uses the Access Act to "proscribe" protected speech. Those cases involve a wholly separate question: whether courts sitting in equity may enjoin activities that do not violate the Act as a remedy for activities that quite clearly do violate the Act. That question has no bearing here.

Appellants argue that the District Court also ignored evidence that the Government was not applying the Act evenhandedly. Although they claim that the Government has refused to prosecute abortion clinic escorts and employees who

assault and threaten anti-abortion protesters, appellants make no selective enforcement allegation in their complaint, nor have they amended their complaint to state such a claim. In ruling on the Government's Rule 12(c) motion, the district court properly refused to consider evidence outside the scope of the complaint. *See Haynesworth v. Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987) (Rule 12(c) requires movant to show, at close of pleadings, that no genuine issue of material fact remains to be resolved).

We affirm the judgment of the district court.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL A. TERRY, et al.,

Plaintiffs,

v. Civil Action No. 94-1154 (HHG)

JANET RENO and ERIC HOLDER,

Defendants.

[FILED Nov. 21, 1995]

MEMORANDUM

I.

This action deals with the subject of activities engaged in by opponents of abortions outside facilities where abortions and other reproductive health services are performed. More specifically, it addresses the issue of the constitutionality of a federal law which restricts some of these activities. In that respect, the instant action is the first to be decided in this District. See infra.

The action is presently before the Court on the government's Motion for Judgment on the Pleadings. Upon consideration of the Motion, plaintiffs' Opposition thereto, the government's Reply, plaintiffs' Supplemental Memorandum, and the government's Response, the Court has determined that the

government's motion should be granted.

The Freedom of Access to Clinics Act ("FACE") was enacted by Congress in response to growing concern about violent acts occurring outside of reproductive health facilities. See generally S. Rep. No. 117, 103d Cong., 1st Sess. (1993). The Act provides that certain penalties shall be imposed on anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . . or
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . .

18 U.S.C. § 248(a) (1994). For a first offense, the penalty is a fine and/or imprisonment of not more than one year; however, if the offense is "exclusively a nonviolent physical obstruction," the maximum fine is $10,000 and the maximum length of imprisonment is six months. Id. § 248(b). For a second or subsequent offense, the penalty is a fine and/or imprisonment of not more than three years. Id.

Plaintiffs, individuals opposed to abortion, brought this action challenging the constitutionality of FACE. Plaintiffs have participated in certain activities outside of various facilities that provide abortions, including counselling individuals entering the facilities, passing out literature, and engaging in prayers. They challenge FACE on First, Fifth, Eighth, Tenth, and Fourteenth

Amendment grounds. Plaintiffs also allege that FACE violates the Religious Freedom Restoration Act ("RFRA"). Plaintiffs seek declaratory and injunctive relief.

Defendants have moved to dismiss the action pursuant to Rule 12(c). That rule provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Rule 12(c) requires that the movant show, at the close of the pleadings, that no material issue of fact remains to be [re]solved, and that he or she is clearly entitled to judgment as a matter of law." Haynesworth v. Miller, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987).[1]

---

1. Plaintiffs argue that their complaint brings an "as applied" challenge as well as a facial challenge, and on that basis, they argue it is not amenable to disposition under Rule 12(c). To the contrary, such a challenge is subject to Rule 12(c) if, at the close of the pleadings, no genuine issues of material facts are in dispute. See Haynesworth, 820 F.2d at 1249 n.11. Accepting all well-pleaded facts of plaintiffs' complaint as true, see id., the Court finds no constitutional violations, as explained infra.

Plaintiffs also argue that there is a factual dispute regarding whether pro-life advocates are being subject to force or threats of force by pro-choice "escorts" at clinics. They argue that any physical response on the part of a pro-life advocate might violate FACE. Plaintiffs made no reference whatever to these activities in their original complaint, which has not been amended; these allegations are thus outside of the scope of the complaint. Under Rule 12(c), the Court may not consider matters outside of the pleadings unless the Court treats the

While no decision has been rendered in this Circuit, the constitutionality of FACE has been addressed elsewhere by several district courts and two Courts of Appeals.[2] Except for

---

motion as one for summary judgment. Under Rule 7(a), if no counterclaim or cross-claim is pleaded in the answer, the pleadings close with the answer, unless the court orders a reply to be filed. See 2A James W. Moore, Moore's Federal Practice, ¶ 12.15 at 12-137(1995). Accordingly, plaintiffs' attempt to expand their complaint in order to create a genuine issue of material fact by alleging different facts and theories in their opposition than those presented in their complaint must fail. See 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 1371 at 543 (1990) ("It is within the court's discretion whether to accept extra-pleading matter on a motion for judgment on the pleadings and treat it as one for summary judgment."); see also Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1990) (if trial court considers evidence outside of the pleadings, it must treat rule 12(c) motion as a summary judgment motion). Plaintiffs may not make allegations outside of the scope of their complaint in order to avoid a Rule 12(c) dismissal. See United States v. Wood, 925 F.2d 1580, 1581 (7th Cir. 1991) (per curiam) (under Rule 12(c), "[t]he district court may not look beyond the pleadings").

2. Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995); Woodall v. Reno, 47 F.3d 656 (4th Cir.), cert. denied, 115 S. Ct. 2577 (1995); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995); United States v. Lucero, 895 F. Supp. 1421 (D. Kan. 1995); United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995); United States v.

one district court in Wisconsin, United States v. Wilson, 880 F. Supp. 621 (E.D. Wisc. 1995), the courts have uniformly agreed that FACE is not constitutionality infirm. As elaborated below, this Court agrees with the reasoning of the tribunals which have upheld FACE, and it will therefore grant the government's motion for judgment on the pleadings.

The heart of plaintiffs' claims is embodied in the First Amendment. They argue that FACE violates their First Amendment rights to freedom of speech, freedom of the press, and freedom of assembly.

A. Freedom of Speech

Plaintiffs allege that FACE violates their freedom of speech in several ways. They argue that FACE is overbroad and vague; that it constitutes a prior restraint; that it does not serve a compelling (or even a significant or permissible) government interest; that FACE is not narrowly tailored and there are less

---

Dinwiddie, 885 F. Supp. 1286 (W.D. Mo. 1995); United States v. Wilson, 880 F. Supp. 621 (E.D. Wisc. 1995); United States v. Wilson, 1994 WL 777319 (E.D. Wisc. Nov. 30, 1994); United States v. Brock, 863 F. Supp. 851 (E.D. Wisc. 1994); United States v. Hill, 1994 WL 818202 (N.D. Fla. Sept. 15, 1994); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Cheffer v. Reno, 1994 WL 644873 (M.D. Fla. July 26, 1994), aff'd, 55 F.3d 1518 (11th Cir. 1995); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994); American Life League, Inc. v. Reno, 855 F. Supp. 137 (E.D. Va. 1994), aff'd, 47 F.3d 642 (4th Cir.), and cert. denied, 116 S. Ct. 55 (1995).

restrictive means available; that FACE is viewpoint- and content-based; that there are insufficient alternative channels of alternative communication; that FACE is an irrational and unreasonable restraint on speech in a public forum; and that FACE has a chilling effect because of its severe punishments and uncertain application.

As a preliminary matter, it is necessary to stress what the Act does and does not address. The Act prohibits injury, intimidation, and interference, that is accomplished "by force and threat of force or by physical obstruction." 18 U.S.C. § 248(a)(1) (1994). Indeed, it expressly provides that it shall not be construed "to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment." Id. § 248(d)(1). To put it another way, the Act regulates conduct, not speech, unless such speech constitutes a threat of force. See, e.g., Cook, 859 F. Supp. at 1010 ("The statute does not criminalize speech at all; rather, it regulates and proscribes conduct that uses force, the threat of force, or physical obstruction to achieve its objective."); see also United States v. Lindgren, 883 F. Supp. 1321, 1330 (D.N.D. 1995) ("Congress did not forbid harassment, rudeness, or intimidation, unless the conduct constitutes `force, threat of force, or physical obstruction.'"). However, because "[t]he Act might incidentally affect some conduct with protected expressive elements," it must be examined under the First Amendment. American Life League, 47 F.3d at 648.

The Fourth Circuit addressed First Amendment challenges similar to those raised here in American Life League v. Reno. The court first found that FACE was viewpoint and content neutral, id. at 649-50, and it further held that the statute was not

unconstitutionally overbroad or vague, and thus did not have a "chilling" effect on protected speech. Id. at 652-53. The Court applied the O'Brien[3] test, and held that the Act's incidental effect on speech from its regulation of conduct passed constitutional muster.[4] Id. at 651-52. This Court substantially agrees with the Fourth Circuit's analysis, and on that basis it rejects the plaintiffs' claims proffered on these grounds.

The Fourth Circuit also rejected arguments that FACE is unconstitutional to the extent that its injunctive relief provisions authorize prior restraints on speech. Woodall, 47 F.3d at 658. Here again, this Court agreed with the Fourth Circuit that any prior restraint challenges are premature in the absence of an injunction against the plaintiffs. See id.

With respect to the plaintiffs' remaining arguments, it is simply not so that there are insufficient alternative channels of alternative communication or that FACE is an irrational and unreasonable restraint on speech in a public forum. Consistent with the law, plaintiffs are fully able to communicate their messages in a non-violent manner. See American Life League, 47 F.3d at 652. In short, this Court finds nothing in FACE to be "irrational" or "unreasonable."

---

3. United States v. O'Brien, 391 U.S. 367 (1968).

4. In applying the O'Brien test, the Fourth Circuit held that the Act furthered important or substantial governmental interests, that the government's interests were unrelated to the suppression of free expression, and that the Act was narrowly tailored. 47 F.3d at 651-52.

B. Freedom of Press

Plaintiffs also contend that the Act interferes with their ability to distribute literature advancing pro-life views, and thus infringes on the freedom of press. This argument totally lacks merit. The Act prohibits the use of force, threats of force, and physical obstruction only. It in no way prohibits plaintiffs from peacefully distributing literature. See Cook, 859 F. Supp. at 1010.

C. Freedom of Assembly

Plaintiffs also maintain that FACE interferes with their right to assemble in a traditional public forum. To repeat once again, that Act prohibits the use of force, threats of force, and physical obstruction only. It does not in any manner prevent peaceable assembly, as protected by the First Amendment. The Court discerns no interference with plaintiffs' right to peaceable assembly. Accordingly, the Court will grant defendants' motion for judgment on the pleadings on this count.

III

Plaintiffs' other constitutional challenges include claims that the Act violates the Fifth Amendment's Due Process and Equal Protection Clauses and the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment. Plaintiffs also challenge Congressional authority to pass FACE. Finally, plaintiffs argue that the Act violates the Religious Freedom Restoration Act.

Plaintiffs' argument under the Due Process Clause is based upon the assumption that FACE is both vague and irrational. As the Court has held above, FACE is not unconstitutionally vague, and therefore it does not violate due process. See Riely, 860 F. Supp. at 705 n.9. The Court also finds that FACE is a rational and reasonable congressional response to growing

concerns about violence at reproductive health facilities. Thus, plaintiffs' due process challenge must fail.

Plaintiffs also contend that FACE violates equal protection because it is targeted at a particular social protest. Plaintiffs point out in support of their argument that their protests are subject to different burdens than protests by members of labor movements, for example. Defendants, in their answer, "[a]dmit that FACE does not apply to certain labor activities." The Court first notes that plaintiffs are not members of a suspect or quasi-suspect class. Because the Court concludes that FACE does not infringe upon a constitutionally protected right, the Act is subject to the rational basis test rather than a heightened level of security. Riely, 860 F. Supp. at 706. The Court finds this test to be amply met in light of the legislative history of the Act. See id.[5]

Plaintiffs also contend that the punishment provisions of FACE are disproportionate to the gravity of the offense, and thus constitute an "excessive fine and amount to cruel and unusual punishment, in violation of the Eighth Amendment." As the Eleventh Circuit noted, such challenges to FACE are not ripe in the absence of "the actual, or immediately impending, imposition of the challenged form of punishment."[6] Cheffer, 55

---

5. Furthermore, even if strict scrutiny were to apply, the Court agrees with the Riely Court that the strict scrutiny standard would be satisfied as well. See id.

6. Specifically, the Eleventh Circuit held that the appellants' claims were not ripe because the court could not "determine from the face of the Act what penalties will actually be imposed," and because the "appellants have failed to show

F.3d at 1523 (citing Askins v. District of Columbia, 877 F.2d 94, 97-99 (D.C. Cir. 1989)). Accordingly, this Court holds that plaintiffs' Eighth Amendment claims are not ripe for consideration.[7]

Plaintiffs challenge the validity of FACE under the Tenth Amendment, arguing that Congress lacked the power to pass the Act under either the Commerce Clause, U.S. Const. art. I, § 8, or the Enforcement Clause, U.S. Const. amend. XIV, § 5. Here again, the Eleventh Circuit decided this issue when it addressed the power of Congress to pass FACE in light of the recently decided Supreme Court decision, United States v. Lopez, 115 S. Ct. 1624 (1995), which held that Congress exceeded its authority under the Commerce Clause when it passed the Gun-Free School Zones Act, 18 U.S.C. § 922(q). Cheffer, 55 F.3d at 1520-21. This Court agrees with the Cheffer Court that the Act "protects and regulates commercial enterprises operating in interstate commerce." 55 F.3d at 1520. Because the Act is a permissible exercise of congressional power under the Commerce Clause, it does not violate the Tenth Amendment. The Court therefore need not reach the question of whether Congress also has authority to pass the Act under the Fourteenth Amendment. See id. at 1521 n.7.

---

that the mere existence of the Access Act causes them substantial hardship." 55 F.3d at 1524.

7. Even if these claims were ripe, the Court agrees with the Riely Court that "the harshness of the penalties provided is commensurate with the gravity of the proscribed conduct." 860 F. Supp. at 706.

Plaintiffs' Fourteenth Amendment argument is based on an assertion that FACE "empower[s] the states to engage in conduct violat[ing] . . . the First, Fourth, Fifth, Eighth, and Tenth Amendments."[8] As the court in Riely noted, "none of the other challenged provisions of FACE violate any of these constitutional provisions." 860 F. Supp. at 708. This Court agrees with the Riely Court that, as a result, "FACE does not violate these constitutional provisions by authorizing the state attorneys general to bring a civil action on behalf of individuals injured by those acting in violation of FACE." Id. at 709.

Finally, Plaintiffs contend that FACE violates the Religious Freedom Restoration Act ("RFRA"). RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a) (Supp. V 1993). However also RFRA provides:

> Government may substantially burden a person's exercise of religion . . . if it demonstrates that application of the burden to the person --
>
> (1) is in furtherance of a compelling government interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000bb-1(b). Assuming, arguendo, that plaintiffs have demonstrated that FACE "substantially burdens" the exercise of their religion, cf. Cheffer, 55 F.3d at 1522, this Court agrees with the Fourth Circuit's conclusion in American Life League

---

8. The statute allows state attorneys general to institute proceedings on behalf of persons injured by conduct violating FACE. 18 U.S.C. § 248(c)(3) (1994).

that FACE furthers a compelling governmental interest by sufficiently narrow means and thus does not violate RFRA. 47 F.3d at 656; see also Brock, 863 F. Supp at 866-67 (FACE does not violate RFRA); Riely, 860 F. Supp. at 709 (same); Council for Life Coalition, 856 F. Supp. at 1430-31 (same). Accordingly, defendants are entitled to judgment on the pleadings on this count as well.

IV

For the above stated reasons, the Court concludes that FACE does not violate either the Constitution or RFRA. Accepting as true well-pleaded facts of the complaint, defendants are entitled to judgment on the pleadings.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL A. TERRY, et al.,

Plaintiffs,

v. Civil Action No. 94-1154 (HHG)

JANET RENO and ERIC HOLDER,

Defendants.

[FILED Nov. 21, 1995]

Upon consideration of defendants' motion for judgment on the pleadings, plaintiffs' opposition, defendants' reply and plaintiffs' supplemental memorandum in opposition, and for the reasons set forth in the memorandum accompanying this order, it is this 22nd day of November, 1995,

ORDERED that defendants' motion for judgment on the pleadings be and it is hereby GRANTED; and it is further

ORDERED that plaintiffs' motion to compel depositions [#16] and defendants' motions for protective orders [#14, 28] are hereby DISMISSED as moot.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX D

1. **Commerce Clause, U.S. Const., art. I, § 8, cl. 3**

Section 8. [1] The Congress shall have Power . . . [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

2. **U.S. Const. amend. I.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. **U.S. Const. amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. **U.S. Const. amend. X**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX E

Title 18 U.S.C. § 248. Freedom of access to clinic entrances

(a) Prohibited activities.--Whoever--

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties.--Whoever violates this section shall--

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this

title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies.--

(1) Right of action.--

(A) In general.--Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the

rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States.--

(A) In general.--If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent--

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General.--

(A) In general.--If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction.--Nothing in this section shall be construed--

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions.--As used in this section:

(1) Facility.--The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with.--The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate.--The term "intimidate" means to place a person

in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction.--The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services.--The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State.--The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

No. 96-1425

Supreme Court, U.S.
FILED
MAY 9 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RANDALL A. TERRY, REVEREND PATRICK MAHONEY, A. DAVID HENDERSON, ROBERT JEWITT, JOSEPH J. SLOVENEC, REVEREND JAMES J. RUDD,

Petitioners,

—v.—

JANET RENO, Attorney General of the United States of America, and ERIC H. HOLDER, JR., United States Attorney for the District of Columbia,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CAPITAL WOMEN'S CENTER; COMMONWEALTH WOMEN'S CLINIC; NATIONAL ABORTION FEDERATION; NATIONAL ORGANIZATION FOR WOMEN; PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, DC; GEORGE R. TILLER, M.D.; AND SUSAN WICKLUND, M.D.

Michael Erdos
Priscilla Smith
Kathryn Kolbert
THE CENTER FOR REPRODUCTIVE LAW & POLICY
120 Wall Street, 18th Floor
New York, New York 10005

Martha Davis*
Yolanda Wu
NATIONAL ORGANIZATION FOR WOMEN
99 Hudson Street
New York, New York 10013

Roger Evans
Celeste Lacy Davis
Legal Action for Reproductive Rights
PLANNED PARENTHOOD OF AMERICA
810 Seventh Avenue
New York, New York 10019

John Vanderstar
COVINGTON & BURLING
2101 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-756

Counsel for Intervenor-Respondents

QUESTIONS PRESENTED

1. Whether the Freedom of Access to Clinic Entrances Act, 18 U.S.C. §§ 248 *et seq.*, exceeds Congress' power under the Commerce Clause?

2. Whether the Freedom of Access to Clinic Entrances Act, 18 U.S.C. §§ 248 *et seq.*, violates Petitioners' First Amendment rights?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

Proceedings Below 1

The Factual Record of Harm to Respondents 1

REASONS THE PETITION SHOULD BE DENIED 4

I. THE FEDERAL COURTS OF APPEALS HAVE UNIFORMLY AGREED THAT FACE IS CONSTITUTIONAL. 4

II. CONGRESS' AUTHORITY TO ENACT FACE UNDER THE COMMERCE CLAUSE IS DEMONSTRATED BY THE EXTENSIVE CONGRESSIONAL FINDINGS THAT FEDERAL LEGISLATION WAS NECESSARY TO ADDRESS A NATIONWIDE CAMPAIGN OF VIOLENCE AND OBSTRUCTION DIRECTED AT REPRODUCTIVE HEALTH CARE FACILITIES, PROVIDERS, AND PATIENTS 5

A. CONGRESS ENACTED FACE TO CURB THE VIOLENCE AND OBSTRUCTION DIRECTED AT REPRODUCTIVE HEALTH CARE PROVIDERS AND PATIENTS, WHICH POSE A SERIOUS THREAT TO PUBLIC HEALTH AND IMPEDE WOMEN'S ABILITY TO EXERCISE THEIRCONSTITUTIONAL RIGHT TO REPRODUCTIVE CHOICE 7

B. CONGRESS FOUND THAT ANTI-ABORTION VIOLENCE AND OBSTRUCTION ARE DESIGNED TO AND HAVE SUCCEEDED IN ELIMINATING ACCESS TO ABORTION SERVICES 11

C. CONGRESS FOUND THAT ANTI-ABORTION VIOLENCE AND OBSTRUCTION DIRECTLY JEOPARDIZE WOMEN'S HEALTH 17

D. CONGRESS ENACTED FACE TO ADDRESS THE INADEQUACIES IN EXISTING FEDERAL LAW AND STATE AND LOCAL LAW ENFORCEMENT'S FAILURE EFFECTIVELY TO ADDRESS THE NATIONWIDE ASSAULT AGAINST REPRODUCTIVE HEALTH CARE PROVIDERS AND PATIENTS. 18

CONCLUSION 22

TABLE OF AUTHORITIES

PAGE

American College of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656 (E.D. Pa. 1985) 18

American Life League v. Reno, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995) 5

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 2, 13, 15, 19

Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) 5

Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994), *vacated and remanded on other grounds*, 74 F.3d 97 (5th Cir. 1996) 5

Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994) 5

Florida v. Ashley, 670 So.2d 1087 (Fla. Dist. Ct. App. 1996), *cert. granted*, No. 87,719 (Fla. 1996) 16

Hoffman v. Hunt, 923 F. Supp. 791 (W.D.N.C. 1996), *appeal pending*, Nos. 96-1581, 96-1582, 96-1623 (4th Cir., argued Apr. 9, 1997) 5

Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995) 20

Lucero v. Trosch, 904 F. Supp. 1336 (S.D. Ala. 1995) 5

Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994) 17

National Organization for Women v. Scheidler, 765 F. Supp. 937 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd on other grounds*, 114 S. Ct. 798 (1994) 12, 13

National Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994)..... 13

National Organization for Women v. Scheidler, 114 S. Ct. 798 (1994)..... 2

New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989) , *Appeals consolidated & aff'd as modified,*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990)..... 15

New York State NOW v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988), *appeals consolidated & aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990)..... 2

NOW New York State v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990)..... 8

NOW v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part on other grounds, vacated in part sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)..... 13, 21

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 19

Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists, 946 F. Supp. 1355 (D. Or. 1996).....5

Portland Feminist Women's Health Ctr. v. Advocates for Life, 859 F.2d 681 (9th Cir. 1988).....18

Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417 (W.D.N.Y. 1992), *aff'd*, 67 F.3d 377 (2d Cir. 1995) (en banc), *aff'd in part, rev'd in part*, 117 S. Ct. 855 (1997).....8, 17, 18

Riely v. Reno, 850 F. Supp. 693 (D. Ariz. 1994).....5

Roe v. Wade, 410 U.S. 113 (1973).....19

United States v. Cooley, 787 F. Supp. 977 (D. Kan. 1992), *vacated and remanded*, 1 F.3d 985 (10th Cir. 1993).....21

United States v. Dinwiddie, 76 F.3d 913 (8th Cir.), *cert. denied*, 117 S. Ct. 613 (1996).....5, 6

United States v. Hill, 893 F. Supp. 1034 (N.D. Fla. 1994).....9

United States v. Lopez, 115 S. Ct. 1624 (1995).....4, 6, 7

United States v. Scott, 919 F. Supp. 76 (D. Conn. 1996).....5

United States v. Soderna, 82 F.3d 1370 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996).....4, 5, 6

United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995).....5

United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995), *rev'd*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 46 (1996) 5

United States v. Wilson, 73 F.3d 675, *cert. denied*, 117 S. Ct. 46 (1996) 4, 5, 6

Women's Health Care Servs. v. Operation Rescue, 773 F. Supp. 258 (D. Kan. 1991) 12, 15

Woodall v. Reno, 47 F.3d 656 (4th Cir.), *cert. denied*, 115 S. Ct. 2577 (1995) 5

STATUTES & GOVERNMENTAL AUTHORITIES

18 U.S.C. § 248 1

18 U.S.C. § 922 6

42 U.S.C. § 1985 (3) 19

Hearings Before the Senate Comm. on Labor and Human Resources, 103d Cong., 1st Sess. (1993) 10, 11

Hearings on Clinic Violence Before the Subcomm. on Labor of the Senate Comm. on Appropriations, 104th Cong., 1st Sess. (1995) 7, 8

H. Rep. No. 103-306, 103d Cong., 1st Sess. (1993) 3

S. Rep. No. 117, 103d Cong., 1st Sess. (1993) ..... passim

MISCELLEANOUS

Antiabortion Activist is Convicted, Sentenced to Life in Killing at Clinic, Wash. Post, Mar. 6, 1994, at A22 ..9

Sandra Boodman, *Abortion Foes Strike at Doctors' Home Lives*, Wash. Post, Apr. 8, 1993, at A1 19

Sandra Boodman, *The Dearth of Abortion Doctors*, Wash. Post, Apr. 20, 1993, at Z7 .....12, 15

Sandra Boodman, *A Tale of Two Dallas Abortion Doctors: One Surrendered, One is Fighting On*, Wash. Post, Apr. 8, 1993, at A16.....14

William Booth, *Abortion Battle Fatigue; Slain Physician's Replacement Vent Fears, Frustration*, Wash. Post, May 7, 1993, at A3.....12

Lynne Bumpus-Hooper, *Anti-Abortion Leader Draws `Battle Plan,'* Orlando Sentinel Trib., Feb. 21, 1993, at B3 21

Doctor Says He Won't Do Further Abortions, Lakeland Ledger, Mar. 17, 1996, at B5 14

Timothy Egan, *Is Abortion Violence a Plot? Conspiracy is Not Confirmed*, N.Y. Times, June 18, 1995, at A1 13

Feminist Majority Foundation, *1995 Clinic Violence Survey Report* (1996).....14

Jennifer J. Frost, *Family Planning Clinic Services in the United States, 1994*, 28 Fam. Plan. Persp. 92 (1996).....16

David A. Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 Obstetrics & Gynecology 719 (1992).....14

Stephen J. Hedges, *Abortion: Who's Behind the Violence?*, U.S. News & World Rep., Nov. 14, 1994, at 55.....13

Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plan. Persp. 246 (1991) 16

Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp, 54 (1995).....14, 15

Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States 1987-88*, 22 Fam. Plan. Persp. 106 (1990).....14

Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States 1991-92*, 26 Fam. Plan. Persp. 100 (1994).....14

Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Anti-abortion Demonstrations*, 12 Population & Env't 4 (1991).....17

Dirk Johnson, *Abortions, Bibles and Bullets, and the Making of a Militant*, N.Y. Times, Aug. 28, 1993, at A5 10

Joe Kolman, *Abortion Clinic Targeted*, Billings Gazette, April 3, 1997, at A1.....3

National Abortion Federation, *Clinic Support Update: NAF's Report on Anti-Abortion Violence* (March 1997) 2

National Abortion Federation, *Incidents of Violence & Disruption Against Abortion Providers, 1997* *7, 8, 9*

Robert O'Harrow, Jr. & Bill Miller, *U.S. Probe May Focus on Clinic Suspect; Panel's Look at Antiabortion Violence Likely to Include His Activities*, Wash. Post, Jan. 5, 1995, at A4 13

Jeannie Ralston & Barbara Maddux, *The Great Divide*, Life, July 1992 21

Sara Rimer, *Abortion Clinics Seek Doctors But Find Few*, N.Y. Times, Mar. 31, 1993 15

Joseph Scheidler, *Closed: 99 Ways to Stop Abortion* 13

Judy Lundstrom Thomas, *Abortion Foes Vow to Kill; U.S. Probes Signers of Death Declaration*, Ariz. Republic, Aug. 8, 1994, at A1 13

Timeline: Key Events in the Clinic Shootings, Boston Herald, Mar. 19, 1996, at 3. 9

Two Life Terms for Killer at Abortion Clinic, N.Y. Times, Dec. 3, 1994, at A9 9

Intervenor-Respondents Capitol Women's Center, *et al.*, respectfully submit the following brief in opposition to the petition for certiorari filed by Randall A. Terry, *et al.*, docketed on March 10, 1997.

STATEMENT OF THE CASE

Proceedings Below

Petitioners Randall A. Terry, *et al.*, filed this challenge to the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. §§ 248 *et seq.*, in the United States District Court for the District of Columbia on May 26, 1994, the day FACE was signed into law. On June 27, 1994, Respondents Capitol Women's Center, Commonwealth Women's Clinic, National Abortion Federation, National Organization for Women, Planned Parenthood Federation of America, Inc., Planned Parenthood of Metropolitan Washington, D.C., Dr. George R. Tiller, and Dr. Susan Wicklund moved to intervene as defendants; the district court granted the motion on August 18, 1994. On November 21, 1995, the district court granted Respondent Reno's motion for judgment on the pleadings. Pet. App. 24a-36a. The United States Court of Appeals for the District of Columbia Circuit affirmed on December 10, 1996. Pet. App. 1a-23a.

The Factual Record of Harm to Respondents

Respondents moved to intervene because they will be severely harmed if FACE is enjoined or held unconstitutional. The National Abortion Federation ("NAF") is a professional organization of physicians, nurses, counselors, clinic administrators, and other medical professionals who provide women across the country with reproductive health services. Virulent anti-abortion zealots routinely target their attacks on abortion providers. Individual abortion providers are regularly harassed, threatened, and stalked, and several clinics have been victimized by chemical attacks. See Shaw Decl. ¶¶ 3-7.[1/] In March 1993, a physician

---

[1/] The Shaw Declaration, the Johnson Declaration, the Wicklund Declaration, the Tiller Affidavit, and the Codding Affidavit were submitted in support of the Motion to Intervene.

working at a NAF clinic, Dr. David Gunn, was brutally murdered by an anti-abortion militant. *Id.* at ¶ 5; S. Rep. No. 117, 103d Cong., 1st Sess. 3-4 (1993).

The National Organization for Women ("NOW") is a membership organization devoted to securing equal rights for women, including access to reproductive health care. Its over 200,000 members throughout the country include many individuals who use and will use reproductive health services. NOW has been a plaintiff in many cases seeking remedies against the anti-choice extremism that frequently plagues its members. *See, e.g., National Organization for Women v. Scheidler*, 114 S. Ct. 798 (1994); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *New York State NOW v. Terry*, 697 F. Supp. 1324 (S.D.N.Y. 1988), *appeals consolidated & aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

Respondents Commonwealth Women's Clinic in Falls Church, Virginia, and the Capitol Women's Center in Washington, D.C., two clinics that provide a range of reproductive health services, including abortions, have been the targets of various forms of intimidation, harassment, blockades, and violence. In particular, anti-abortion extremists have on numerous occasions rendered impassable the entrances and exits to all of the clinics. Codding Decl. ¶¶ 4-5, 10-13. During one demonstration at the Commonwealth Women's Clinic, anti-abortion zealots physically blockaded all entrances and exits of the clinic, completely disrupting the clinic's activities for several hours and overwhelming the local police department. *Id.* at ¶¶ 4-5. Anti-choice militants have also attempted to injure or intimidate clinic personnel and patients by sending repeated bomb threats and throwing iron bars and rocks through the clinic windows. *Id.* at ¶¶ 7-9. Most recently, the Commonwealth Women's Clinic was forced to close in February 1997 for four days and sustained over $100,000 in damage from an arson attack. National Abortion Federation, *Clinic Support Update: NAF's Report on Anti-Abortion Violence* 1 (March 1997).

Affiliate clinics of the Planned Parenthood Federation have likewise been the targets of numerous instances of violence. For

example, Planned Parenthood Center of Syracuse, New York, sustained extensive damage on April 14, 1994 when a woman posing as a patient poured a pint of a toxic chemical into the clinic's public restroom; the building required evacuation, and staff members suffered respiratory problems. Johnson Decl. ¶ 3. Planned Parenthood clinics in several other states have been subject to bomb threats and the blockading of their doorways and hallways. *Id.* at ¶¶ 4-7.

Anti-abortion militants have forced Respondents Drs. Wicklund and Tiller to practice medicine in a climate of fear and intimidation. Since 1991, extremists have stalked Dr. Wicklund, routinely surrounding her car and house and following her every move. Wicklund Decl. ¶¶ 5-10. Throughout her career, she has also been threatened and assaulted by anti-abortion zealots. She was once assaulted by two anti-choice zealots who leapt from a van, grabbed her, and slammed her against the van, all the while screaming that she was a "baby killer." *Id.* at ¶ 13. Dr. Wicklund has had her freedom of movement regularly impeded by anti-abortion zealots who have blocked her driveway, her car, and her person on a constant basis. *Id.* at ¶¶ 6-10. Moreover, the clinics where Dr. Wicklund has provided services have been attacked by anti-choice extremists, and their entrances and exits have been blockaded on numerous occasions. See *id.* at ¶¶ 11-13. Last month, an anti-abortion activist was arrested for setting fire to one of Dr. Wicklund's clinics; the arson caused about $2,000 in damage, and was extinguished just minutes before burning out of control. Joe Kolman, *Abortion Clinic Targeted*, Billings Gazette, April 3, 1997, at A1.

Dr. Tiller has had similar experiences. His clinic, Women's Health Care Services, has experienced numerous blockades, and a pipe bombing that caused approximately $75,000 in damage. Tiller Aff. ¶¶ 3-4. In particular, during what Operation Rescue called its "Summer of Mercy" in 1991, hundreds of militants surrounded and obstructed access to the clinic, causing the overwhelmed local police department to ask the clinic to close its doors for five days. *Id.* at ¶ 5; H. Rep. No. 103-306, 103d Cong., 1st Sess. 7 (1993). Even after the clinic obtained a federal injunction to prohibit Operation Rescue from blocking the entrances and exits of the

clinic, zealots continued their blockades, including the particularly dangerous and shocking tactic of encouraging children to lie on the street in front of vehicles to prevent patients from coming to the clinic. Tiller Aff. ¶ 6. In 1993, as Dr. Tiller attempted to leave the clinic, he was shot in each arm by Rochelle "Shelley" Shannon, an anti-abortion militant. *Id.* at ¶ 7. The same day, Ms. Shannon also assaulted a nurse at Dr. Tiller's clinic. *Id.*

REASONS THE PETITION SHOULD BE DENIED

Petitioners' request for a writ of certiorari must be denied because they have failed to establish any of the factors that weigh in favor of granting the petition. The Court of Appeals for the District of Columbia has not "rendered a decision in conflict with a decision of another United States court of appeals on the same matter." Sup. Ct. R. 10(a). Indeed, all federal appellate courts to have addressed the issue agree that FACE is constitutional. Nor has the Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this Court, or . . . decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10(c). Recent precedent from this Court makes clear that the extensive congressional findings regarding the impact on interstate commerce of violent and obstructive anti-abortion activities are highly relevant to the question of FACE's constitutionality under the Commerce Clause, *see United States v. Lopez*, 115 S. Ct. 1624 (1995); these finding easily demonstrate that FACE is constitutional. There is no need for this Court to use its limited resources to answer questions which are a matter of settled law. The petition should therefore be denied.

I. THE FEDERAL COURTS OF APPEALS HAVE UNIFORMLY AGREED THAT FACE IS CONSTITUTIONAL.

Far from being a "subject of . . . constitutional controversy," Pet. Brief at 5, there has been complete agreement within the federal courts of appeals that FACE is constitutional. *See United States v. Soderna*, 82 F.3d 1370 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996); *United States v. Wilson*, 73 F.3d 675 (7th Cir.),

cert. denied, 117 S. Ct. 46 (1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.), *cert. denied*, 117 S. Ct 613 (1996).; *Woodall v. Reno*, 47 F.3d 656 (4th Cir.), *cert. denied*, 115 S. Ct. 2577 (1995); *American Life League v. Reno*, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995).[2/] Each appellate court has dismissed both First Amendment and Commerce Clause challenges to FACE. *See Soderna*, 82 F.3d at 1373-77; *Wilson*, 73 F.3d at 680-86; *Dinwiddie*, 76 F.3d at 919-24; *Woodall*, 47 F.3d at 657-58; *American Life League*, 47 F.3d at 647-54; *Cheffer*, 55 F.3d at 1519-22. Because there is no conflict between federal appellate courts on the issues for which Petitioners now seek review, there is no need for this Court to grant certiorari. Sup. Ct. R. 10(a).

II. CONGRESS' AUTHORITY TO ENACT FACE UNDER THE COMMERCE CLAUSE IS DEMONSTRATED BY THE EXTENSIVE CONGRESSIONAL FINDINGS THAT FEDERAL LEGISLATION WAS NECESSARY TO ADDRESS A NATIONWIDE CAMPAIGN OF VIOLENCE AND OBSTRUCTION DIRECTED AT REPRODUCTIVE HEALTH CARE FACILITIES, PROVIDERS, AND PATIENTS.

Courts examining the constitutionality of FACE under the Commerce Clause need only determine that "a rational basis existed

---

[2/] Several federal district courts have reached the same conclusion. *See, e.g., United States v. Scott*, 919 F. Supp. 76 (D. Conn. 1996); *Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 946 F. Supp. 1355 (D. Or. 1996); *Lucero v. Trosch*, 904 F. Supp. 1336 (S.D. Ala. 1995); *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995); *Cook v. Reno*, 859 F. Supp. 1008 (W.D. La. 1994), *vacated and remanded on other grounds*, 74 F.3d 97 (5th Cir. 1996); *Riely v. Reno*, 850 F. Supp. 693 (D. Ariz. 1994); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994). Of the two decisions finding FACE unconstitutional, one was reversed and the other is currently on appeal. *See United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995), *rev'd*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 46 (1996); *Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996), *appeal pending*, Nos. 96-1581, 96-1582, 96-1623 (4th Cir., argued Apr. 9, 1997).

for [Congress] concluding that a regulated activity sufficiently affected interstate commerce," *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995).[3/] Contrary to Petitioners' misleading assertions[4/], a court performing such an analysis "of course consider[s] legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." *Id.* at 1631; *see also Wilson*, 73 F.3d at 680-83 .

Here, the legislative findings are extensive and easily demonstrate the constitutionality of FACE. Unlike *Lopez*, where Congress made no findings regarding the effects of gun possession near schools on interstate commerce, in enacting FACE, Congress made extensive factual findings on the impact of anti-choice violence and obstruction on the operation of reproductive health clinics and on their impact on interstate commerce. These congressional findings not only bolster the constitutionality of FACE under the Commerce Clause, they also demonstrate why

---

[3/] In *Lopez*, this Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922, on the ground that Congress had exceeded its Commerce Clause authority in enacting it. In doing so, the Court set forth three categories of activity that Congress can regulate or protect under its Commerce Clause power: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce,"and (3) "activities that substantially affect interstate commerce." 115 S. Ct. at 1629-30. FACE clearly falls within both the second and third *Lopez* categories. *See Soderna*, 82 F.3d at 1373-74; *Wilson*, 73 F.3d at 679-89; *Dinwiddle*, 76 F.3d at 919-21. Although this brief addresses only the congressional findings relating to the third category under the Commerce Clause, Intervenor-Respondents here adopt Respondent Reno's position in all respects regarding the Commerce Clause and the First Amendment.

[4/] Petitioners attempt to dismiss the congressional findings relied on by the Court of Appeals, Pet. App. 5a-13a, by quoting this Court's notation in *Lopez* that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so,"and that "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question." Pet. Br. at 14 (quoting *Lopez*, 115 S. Ct. at 1629 n.2 (citations omitted)). Petitioners ignore the unmistakable fact that the Court made these remarks not to downplay congressional findings, but rather to stress their importance.

FACE and its continued enforcement are critical to the lives and well-being of reproductive health care patients and providers throughout this country.

A. CONGRESS ENACTED FACE TO CURB THE VIOLENCE AND OBSTRUCTION DIRECTED AT REPRODUCTIVE HEALTH CARE PROVIDERS AND PATIENTS, WHICH POSE A SERIOUS THREAT TO PUBLIC HEALTH AND IMPEDE WOMEN'S ABILITY TO EXERCISE THEIR CONSTITUTIONAL RIGHT TO REPRODUCTIVE CHOICE.

Congress made extensive factual findings of physical obstruction, force and violence directed at reproductive health care providers and patients around the country. These findings make clear that Congress had the authority to enact FACE under the Commerce Clause. As noted in the Senate Report, from 1977 through 1994, the escalation of violent, obstructive and threatening activities by anti-choice extremists against women seeking abortions and their health care providers included over 6,000 clinic blockades throughout the United States, almost 100 physical assaults on providers, and nearly 200 attempted or completed arsons, firebombings and bombings of abortion-related medical facilities. S. Rep. No. 117, 103d Cong., 1st Sess. 3, 5 (1993) [hereinafter "S. Rep."]; *see* National Abortion Federation, *Incidents of Violence & Disruption Against Abortion Providers, 1997* 1 (including incidents reported from Jan. 1, 1977 through March 5, 1997) [hereinafter *Incidents 1997*].[5/] Congress further found that

---

[5/] The violent and obstructive activities that interfere with women's access to reproductive health services and with women's exercise of their constitutionally-protected right to abortion have continued since FACE's enactment. Although the number of clinic blockades has significantly decreased since FACE's enactment, *Incidents 1997*, at 1 (seven reported clinic blockades in 1996 compared to 83 in 1993), the number of violent incidents targeting reproductive health care facilities and providers remains unacceptably high. Reproductive health care clinics across the nation -- many of which do not perform abortions -- continue to report serious acts of physical obstruction, death threats, and property destruction. Hearings on

these activities occurred in every part of the United States. S. Rep. at 12-13. Indeed, Congress found that many of these activities were orchestrated by groups functioning on a national scale and operating across state lines, *id.* at 13-14, causing a direct and substantial impact on patients and providers and on the delivery of reproductive health care in interstate commerce. *Id.* at 31-32; *see infra* pp. 16-18.

The Senate Report describes the full range of violent, obstructive, threatening and destructive anti-choice activities utilized nationwide. S. Rep. at 3-11. During blockades -- massive sieges designed to close the doors of women's health clinics -- activists form human barricades that prevent access to and egress from clinics. S. Rep. at 7-11; *see, e.g., Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1424 (W.D.N.Y. 1992), *aff'd*, 67 F.3d 377 (2d Cir. 1995) (en banc), *aff'd in part, rev'd in part*, 117 S. Ct. 855 (1997); *NOW New York State v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). In addition to obstructing access by sitting, lying down, or standing with interlocking arms in front of clinic entrances, S. Rep. at 7, blockaders have invaded clinics and chained themselves to clinic equipment. *Id.* at 8 & n.16 (citing court decisions). Blockaders have trapped patients and providers in cars as well as clinics, and have engaged in scuffles sufficiently violent to injure both clinic personnel and security forces. *Pro-Choice Network*, 799 F. Supp. at 1424.

The Senate Report also notes anti-choice militants' increasing use of destructive and violent tactics such as arson, bombings, firebombings, chemical attacks and other vandalism. S.

Clinic Violence Before the Subcomm. on Labor of the Senate Comm. on Appropriations, 104th Cong., 1st Sess. (1995) (statement of Kay Arndorfer, Acting Executive Director, National Abortion Federation) (approximately $4 million of damage reported from 1993 to May 1995); *Incidents 1997* at 2 (bombing of Atlanta Northside Family Planning Services in February 1997 incurred over $90,000 in damage). In 1996, there were at least 65 arrests in connection with clinic blockades. *Id.* at 1. These incidents have continued during the first 2 months of 1997. *Id.* Accordingly, the continued and increased enforcement of FACE remains necessary.

Rep. at 5-7.[6] In the first half of 1993, arson attacks on just three clinics caused more than $1.5 million in damage and dramatically reduced the availability of abortion services to women in the affected areas. *Id.* at 5-6. Clinics also witnessed an increase in chemical attacks, in which anti-choice extremists injected butyric acid and other toxins with noxious fumes into the facilities. Anti-choice militants poured butyric acid through holes drilled in clinic walls, sprayed butyric acid through locks and under doors, and left this dangerous chemical in clinic bathrooms. *Id.* at 6.[7] In 1992 and 1993 alone, clinics in fifteen states reported 71 chemical attacks. *Id.*[8]

Most alarmingly, as Congress noted, the violence has escalated to murder.[9] The Senate Committee noted that the shooting

---

[6] Other sources confirm that incidents of arson, vandalism, and death threats had increased dramatically in 1992 and 1993. *Incidents 1997* at 1.

[7] Butyric acid creates an intolerable stench and causes nausea, vomiting, headaches, dizziness, inflamed eyes and skin, and difficulty in breathing. Several people have required hospitalization after such attacks. *Id.*

[8] From 1994, the year of FACE's enactment, through the first two months of 1997, abortion providers reported 40 bombings, arsons, and attempted bombings or arsons, 113 death threats, and 104 incidents of vandalism. *Incidents 1997* at 1.

[9] Michael F. Griffin, who murdered Dr. Gunn, is now serving a life sentence. *Antiabortion Activist is Convicted, Sentenced to Life in Killing at Clinic*, Wash. Post, Mar. 6, 1994, at A22. These murders did not stop with the passage of FACE. In two separate incidents in Florida and Massachusetts, Dr. John Bayard Britton, escort James H. Barrett, and clinic employees Shannon Lowney and Lee Ann Nichols were shot to death by anit-choice extremeists in 1994. Paul Hill shot and killed Britton and Barrett and wounded Barrett's wife outside the Ladies Center abortion clinic in Pensacola, Florida on July 29, 1994. He was convicted under FACE for the murders of Britton and Barrett and sentenced to two concurrent life terms on December 2, 1994. *See United States v. Hill*, 893 F. Supp. 1034, 1039, 1044, 1048 (N.D. Fla. 1994)(separate opinions); *Two Life Terms for Killer at Abortion Clinic*, N.Y. Times, Dec. 3, 1994, at A9. On December 30, 1994, John C. Salvi III gunned down Lowney at Planned Parenthood in Brookline, Massachusetts, drove up the street to the Preterm clinic, and killed Nichols. He wounded five orthers at the two clinics. Salvi was recently convicted of the murders of Lowney and Nichols and sentenced to two consecutive life terms. *Timeline: Key Events in the Clinic Shootings*, Boston Herald, Mar. 19, 1996, at 3.

death of Dr. David Gunn in March 1993 "was a tragic end to years of threats, blockades, and personal attacks he had encountered." S. Rep. at 3-4. In addition to these murders, Congress noted that abortion providers and clinic staff had been the targets of other shootings resulting in serious injuries. In December 1991, a man in a ski mask open fired with a sawed-off shotgun at a clinic in Springfield, Missouri. He wounded two clinic staff members, including the office manager, who was paralyzed as a result of the shooting. S. Rep. at 4. In August, 1993, Rachelle Renae Shannon, an active participant in Oregon's anti-choice movement, fired several shots from a .32-caliber gun, wounding Intervenor-Respondent Dr. Tiller outside his clinic in Wichita, Kansas. Dirk Johnson, *Abortions, Bibles and Bullets, and the Making of a Militant*, N.Y. Times, Aug. 28, 1993, at A5; Tiller Aff. ¶ 7.

The Senate Committee further cited death threats directed at abortion providers. S. Rep. at 10. One letter stated: "Hey . . . [Dr.] Boyd. Those babies didn't know when they were dying by your butcher knife. So now you will die by my gun in your head very soon - and you won't know when - like the babies don't. Get ready your [sic] dead." *Id.* (Statement of Fairmont Center, Senate Committee on Labor and Human Resources Committee, June 2, 1993). It cited threats directed at providers' families as well. Dr. Norman Tompkins of Dallas, Texas received the following message on his answering machine: "I'm going to cut your wife's liver out and make you eat it. Then I'm going to cut your head off . . .." *Id.* (written testimony of Norman T. Tompkins, M.D., House Subcommittee on Crime and Criminal Justice, Committee on the Judiciary, Apr. 1, 1993). The Senate Committee noted that "[a] member of the Pro-Life Action Network confronted Dr. Tompkins' wife and shouted, `Aren't you afraid I'm going to kill you?'" *Id.*

The escalating violence created a climate of terror for reproductive health care providers and patients. Pablo Rodriguez, M.D., a clinical assistant professor of Obstetrics and Gynecology at Brown University Medical School and the Medical Director of Planned Parenthood of Rhode Island, asked the Senate "to walk just a few yards in my shoes and feel what thousands of health care providers across the country feel every day of their lives." Senate Hearings Before the Senate Comm. on Labor and Human

Resources, 103d Cong., 1st Sess. 4 (1993)(Testimony of Pablo Rodriguez, M.D.). Dr. Rodriguez described his experiences as a reproductive health care provider:

> In the beginning, the harassment was the usual nasty letter and graphic pictures of dismembered fetuses; but slowly it became more aggressive. I began receiving strange packages with dolls inside, as well as subscriptions to gun magazines and hunting lodges, showing pictures of dead animals hanging by their extremities. Then the "Wanted Posters" began to appear. . . .Then the doors and locks to our clinic were glued on multiple occasions culminating with three episodes of forceful blockading of our clinic. . . . The day Dr. Gunn was shot, I knew that my life would irrevocably change. One week after his death, as I was driving my mother to the bus station, I realized that my car was steering poorly. Once I dropped her off, I examined my tires and found that there were 45 nails deeply embedded in them; a fortunate finding considering that I was driving over 50 miles an hour on the highway. That evening, when I returned home, still unaware of the location of this act of vandalism, my wife painfully discovered with her foot that my driveway was "booby-trapped" with roofing nails cleverly buried under the snow. An image of my young children running and skinning their knees on that same section of driveway has filled my heart with a fear that, until this day, I have not been able to shake off. The following week I received a bill for an insurance policy on my wife's life, which we had not applied for.

Id. at 3-4.

These legislative findings reveal that Congress enacted FACE to address a nationwide crisis of violent, obstructive, threatening, and destructive conduct directed at reproductive health care providers and patients.

B. CONGRESS FOUND THAT ANTI-ABORTION VIOLENCE AND OBSTRUCTION ARE

DESIGNED TO AND HAVE SUCCEEDED IN ELIMINATING ACCESS TO ABORTION SERVICES.

Congress also made specific findings on anti-choice activists' success in carrying out their goal of curtailing women's access to reproductive health care. Indeed, Congress found that the murders and other acts of violence directed at reproductive health care providers were having exactly their intended effect, in that "[t]he express purpose of the violent and threatening activity . . . is to deny women access to safe and legal abortion services. Anti-abortion activists have made it plain that this conduct is part of a deliberate campaign to eliminate access by closing clinics and intimidating doctors." S. Rep. at 11. Indeed, anti-choice organizations across the country had candidly admitted that a major goal of their violent and intimidating actions is to harass and frighten away physicians from providing abortion services; physicians are considered the "weak link" in women's ability to obtain such health care. *Id.*; *see* William Booth, *Abortion Battle Fatigue; Slain Physician's Replacement Vent Fears, Frustration*, Wash. Post, May 7, 1993, at A3 (quoting Operation Rescue co-founder Keith Tucci).

Operation Rescue Coordinators testified at a House hearing on FACE that anti-choice groups openly endorse force and violence, including the destruction of facilities and murder of physicians, to achieve their stated objective of eliminating access to abortion. S. Rep. at 11. In the words of one such coordinator: "We may not get laws changed or be able to change people's [sic] minds. But if there is no one willing to conduct abortions, there are no abortions." *Id.* (citing Sandra Boodman, *The Dearth of Abortion Doctors*, Wash. Post, Apr. 20, 1993, at Z7). Congress also relied on findings by federal courts that "the 'avowed intent' of the blockaders was to shut down clinics and prevent abortions." S. Rep. at 11 (quoting *Women's Health Care Servs. v. Operation Rescue*, 773 F. Supp. 258, 261-62 (D. Kan. 1991)); *see National Organization for Women v. Scheidler*, 765 F. Supp. 937, 944 (N.D. Ill. 1991) ("[t]he motivation for destroying clinic property, threatening clinic employees, and blocking access . . . was . . . to . . .

further [the] antiabortion cause by limiting the availability of abortion services . . ."), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd on other grounds*, 114 S. Ct. 798 (1994); *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1493 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part on other grounds, vacated in part sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

To achieve their stated purpose of shutting down clinics, some leaders of the anti-choice movement preach that the killing of doctors who perform abortions is justified "on behalf of the unborn." S. Rep. at 4 (testimony of Michael Bray, Coordinator of Operation Rescue, Washington D.C.).[10/] Anti-choice militants also widely distribute various self-help guides advocating violence against doctors and clinics. For example, an "action manual" entitled "The Army of God" is designed to assist anti-choice militants in conducting a wide panoply of illegal, destructive, and violent activities; this step-by-step guide to terrorism closes with a chilling "Declaration" calling for the killing of abortion providers. *See* Timothy Egan, *Is Abortion Violence a Plot? Conspiracy is Not Confirmed*, N.Y. Times, June 18, 1995, at A1, A18; Stephen J. Hedges, *Abortion: Who's Behind the Violence*?, U.S. News & World Rep., Nov. 14, 1994, at 55.[11/]

[10/] Anti-abortion extremists have continued this strategy after the passage of FACE. *See* Robert O'Harrow, Jr. & Bill Miller, *U.S. Probe May Focus on Clinic Suspect; Panel's Look at Antiabortion Violence Likely to Include His Activities*, Wash. Post, Jan. 5, 1995, at A4 ("Defensive Action" petition, organized by Paul Hill and signed after the murder of David Gunn, claims that the murder was justified and encourages "all godly action necessary [to prevent abortions], including the use of force"). Only one week before the murder of Britton and Barrett, Reverend David Trosch, a prominent anti-abortion fanatic, sent a letter to 1,000 people declaring a time in the future when "[w]e will see the beginning of massive killing of abortionists and their staffs." Judy Lundstrom Thomas, *Abortion Foes Vow to Kill; U.S. Probes Signers of Death Declaration*, Ariz. Republic, Aug. 8, 1994, at A1 (quoting letter from Rev. David Trosch, a Catholic priest from Mobile, Alabama, to Members of Congress (July 16, 1994)).

[11/] Another popular piece of militant anti-choice literature is Joseph Scheidler's *Closed: 99 Ways to Stop Abortion*, a handbook "which advocates unlawful methods of interfering with the operations of women's health centers." *National Organization for Women v. Scheidler*, 968 F.2d 612, 615 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

The concerted effort by anti-choice militants to deter physicians from providing abortion services has been effective. Congress recognized that these extreme activities have exacerbated an already severe shortage of physicians who are trained and willing to provide abortions. S. Rep. at 16-17 (citing David A. Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 Obstetrics & Gynecology 719 (1992)). When FACE was enacted, eighty-three percent of counties in the United States had no abortion provider. S. Rep. at 17, n.29 (citing Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 106 (1990)).[12]

The Senate Committee recognized that anti-choice violence caused many physicians to take extreme protective measures such as installing bullet proof glass and wearing bullet proof vests, and intimidated others into ceasing to perform abortions. S. Rep. at 17. Indeed, the number of abortion providers nationwide dropped by eight percent between 1988 and 1992. Henshaw & Van Vort, *supra*, at 106; *see also* Sandra Boodman, *A Tale of Two Dallas Abortion Doctors: One Surrendered, One is Fighting On*, Wash. Post, Apr. 8, 1993, at A16. The Senate Committee noted that in the year after Dr. Gunn's slaying in March 1993, at least eight physicians stopped performing abortions. S. Rep. at 17. Dr. James S. Todd of the American Medical Association testified that:

Due to the growing violence against physicians and

---

[12] The shortage of abortion services has persisted subsequent to the passage of FACE. *See* Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp, 54, 57 (1995); Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States 1991-92*, 26 Fam. Plan. Persp. 100 (1994). Moreover 30% of women of chaildbearing age live in a county in which no abortion services are available. Henshaw & Van Vort, *supra* at 105. *See also* Feminist Majority Foundation, *1995 Clinic Violence Survey Report* 7 (1996) [hereinafter *1995 Survey*] (9% of clinics responding to a nationwide survey reported that staff members had quit in 1995 as a result of anti-abortion violence and harassment); *Doctor Says He Won't Do Further Abortions*, Lakeland Ledger, Mar. 17, 1996, at B5 (out of concern for his safety, Dr. Gostal Arcelin notifies Christians for Life that he will stop providing abortions at Melbourne medical facility).

> health care professionals generally, the AMA believes that [FACE] represents a critical step in permitting dedicated health care professionals to deliver lawful medical services without fear of harassment, threats or violence. . . . Unless the issue of continued violence at health care facilities is directly confronted, the practice of medicine will be severely affected.

Id. at 16 (emphasis added). Congress found that, as a direct result of the widespread and organized anti-choice violence, clinics were finding it nearly impossible to fill physician positions. *Id.* at 17; *see* Sara Rimer, *Abortion Clinics Seek Doctors But Find Few*, N.Y. Times, Mar. 31, 1993, at A15; Sandra Boodman, *The Dearth of Abortion Doctors*, Wash. Post, Apr. 20, 1993, at Z7.

The reduction in the number of reproductive health care providers results in increased costs and travel burdens on providers and patients alike, who must travel greater distances to obtain care. Congress recognized that a significant number of patients and providers travel interstate to obtain or provide reproductive health care services. S. Rep. at 31 (citing *Bray*, 506 U.S. at 264 ("accept[ing] the district court's finding that substantial numbers of women travel interstate to seek abortion services"); S. Rep. at 31 & n. 46 (identifying Respondent-Intervenor Dr. Wicklund, who provides abortion services in Minnesota, Montana, North Dakota, Wisconsin and parts of Canada); S. Rep. at 31 (forty-four percent of the patients at Respondent-Intervenor Dr. Tiller's clinic come from out-of-State) (citing *Women's HealthCare Servs. v. Operation Rescue*, 773 F. Supp. 258, 266-67 (D. Kan. 1991), *rev'd on other grounds*, 24 F.3d 107 (10th Cir. 1994)); *New York State NOW v. Terry*, 704 F. Supp. 1247, 1259-60 (S.D.N.Y. 1989) ("undisputed facts establish that defendants' activities obstruct access to medical facilities to women who have traveled from out-of-state"), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).[13/]

[13/] One study shows that one-quarter of women undergoing abortions in nonhospital facilities travel more than fifty miles from their home to obtain abortions in clinics and eight percent of those women travel more than one hundred miles. Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp. 54, 55-56 (Mar./Apr. 1995).

The shortage of abortion providers particularly burdens low-income, rural, and young women who lack the means to travel to a provider or pay for the procedure. These women are more likely to obtain an abortion later in their pregnancies, when health risks are significantly greater and costs for the procedure are substantially higher, or to be forced to carry an unwanted pregnancy to term. See Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plan. Persp. 246, 248-50 (1991); *see infra* Part C.[14/] Moreover, because low-income women disproportionately rely on clinics for a wide variety of reproductive health care, *see* Jennifer J. Frost, *Family Planning Clinic Services in the United States, 1994*, 28 Fam. Plan. Persp. 92 (1996), they suffer particular harm when clinics are forced to close their doors. For example,

> The Blue Mountain Clinic in Missoula, Montana was burned to the ground in 1992, following several years of escalating blockades. Seventy percent of the clinic's pre-natal program was comprised of Medicaid patients who had traveled an average of 120 miles for their appointments due to lack of care in their own areas. Western Montana's growing population of uninsured, working poor, and Medicare/Medicaid dependent citizens suffered a severe curtailment of medical services as a result.

S. Rep. at 5 (Testimony of Willa Craig, Executive Director, Blue Mountain Clinic, Missoula, MT, Senate Committee on Labor and Human Services, May 12, 1993).

[14/] The plight of low-income women who need to obtain abortions is dramatically illustrated in a case before the Florida Supreme Court. In *Florida v. Ashley*, 670 So.2d 1087 (Fla. Dist. Ct. App. 1996), *cert. granted*, No. 87,719 (Fla. 1996), Kawana Ashley, a 19 year old pregnant woman who could not afford an abortion shot herself in the stomach in a desperate attempt to self-abort. The state charged Ms. Ashley with manslaughter and third-degree felony murder. The lower courts upheld the manslaughter charge and dismissed the murder charge. The case is pending before the Florida Supreme Court.

These legislative findings demonstrate that Congress enacted FACE in response to anti-choice extremists' success at causing a shortage of abortion providers through violent and obstructive acts.

C. CONGRESS FOUND THAT ANTI-ABORTION VIOLENCE AND OBSTRUCTION DIRECTLY JEOPARDIZE WOMEN'S HEALTH.

In enacting FACE, Congress also recognized that the violent and obstructive tactics employed by anti-choice organizations severely endanger women's health. S. Rep. at 14-16. Aggressive and charged encounters at reproductive health facilities impede access to necessary health care at a crucial time and produce traumatic physical and psychological effects. *Id.* The harms caused by the assaults, arsons, bombings and chemical attacks are self-evident; but those caused by blockades and threatening conduct can be equally devastating. In addition to the immediate injuries caused by "pushing, shoving, . . . and other violent acts," *id.* at 17, anti-choice conduct can exacerbate existing medical conditions and increase the risk of post-procedure complications. *Id.* at 15 (quoting *Pro-Choice Network*, 799 F. Supp. at 1427)). Targeting women immediately prior to, during, and after a surgical procedure heightens health risks. Stress and anxiety induced by anti-choice "rescues" cause hypertension and elevated blood pressure in patients, who then often require sedation or special counseling; "[p]atients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery." *Pro-Choice Network*, 799 F. Supp. at 1427; *see also Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2521 (1994) (recognizing similar findings by *Madsen* lower court). One researcher found that anti-choice blockades and attacks cause patients to experience "shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention," which endanger their medical safety. Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Anti-abortion Demonstrations*, 12 Population & Env't 4, 380-81 (1991). These medical conditions, in turn, force physicians to anesthetize their patients with higher doses of sedatives or, if the hypertension is

severe, to turn the patient away altogether. *Pro-Choice Network*, 799 F. Supp. at 1427. The medical distress also can "lead[] to incomplete or inaccurate health history reports which the client completes soon after entry to the [clinic]." *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 859 F.2d 681, 683 (9th Cir. 1988). It also can prolong a patient's recovery time. *See, e.g., American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 662 (E.D. Pa. 1985).

Additionally, women who are prevented from gaining access to a clinic by a blockade, intimidated from entering a clinic because of threatening protests, or sent home because of their anxiety, must delay obtaining their abortions. As one court recognized:

> This delay can increase the risks associated with an abortion. For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded . . .complications may result.

Pro-Choice Network, 799 F. Supp. at 1427.

D. CONGRESS ENACTED FACE TO ADDRESS THE INADEQUACIES IN EXISTING FEDERAL LAW AND STATE AND LOCAL

LAW ENFORCEMENT'S FAILURE EFFECTIVELY TO ADDRESS THE NATIONWIDE ASSAULT AGAINST REPRODUCTIVE HEALTH CARE PROVIDERS AND PATIENTS.

Congress recognized that existing federal, state, and local laws could not adequately prevent the destructive anti-choice conduct around the country. S. Rep. at 17-21. The Senate Report notes that *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), severely restricted federal protection of the constitutional right to reproductive choice established in *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). S. Rep. at 18.[15/] In contrast, anti-choice militants interpreted *Bray* as a message that they would not be held accountable for their violent and obstructive activities. Anti-choice activist Joseph Scheidler has stated: "We haven't been successful in getting the Human Life Amendment passed or in getting Roe overturned. When you get doctors out, you can have all the laws on the books you want and it doesn't mean a thing." Sandra Boodman, *Abortion Foes Strike at Doctors' Home Lives*, Wash. Post, Apr. 8, 1993, at A1, A17.[16/] Congress correctly recognized that new federal protections were necessary to fill "the serious gap in the Federal laws [created by *Bray*]." S. Rep. at 18.

In addition, Congress recognized the failure of state and local law enforcement to protect access to reproductive health clinics. *Id.* at 19-21. Congress found that in some instances "local officials have willfully refused to act in response to anti-abortion violence and blockades." *Id.* at 19.[17/] In others, local officials

---

[15/] In *Bray*, the Supreme Court held that the deprivation clause of 42 U.S.C. § 1985(3) did not protect women's privacy rights against anti-choice violence, coercion and intimidation.

[16/] A "Human Life Amendment" refers to a proposed constitutional amendment that would declare a fertilized egg a "person" under the Contitution, and allow states to ban virtually all abortions.

[17/] The mayor of Buffalo made the following remark about Operation Rescue's "Spring of Life" invasion: "If they close down one abortion mill . . . then I think they'll have done their job." *Id.* at 19 n.34 (citing David Treadwill, *Buffalo Braces for Massive Abortion Protests*, Los Angeles

refused to enforce the law because they sympathized with the blockaders. *Id.* Other local officials simply were overwhelmed by the sheer number of militant extremists. *Id.* at 20. At a blockade of Respondent-Intervenor Commonwealth Women's Clinic, "the city's entire police force of 30 uniformed officers faced blockades involving as many as 240 persons, and the city could not effectively combat the blockaders' military-style tactics." S. Rep. at 20.[18]

Congress also recognized that "a patchwork of State and local laws is inherently inadequate to address what is a nationwide, interstate phenomenon." S. Rep. at 19. Not only are State and local laws insufficient because their low penalties have little deterrent effect, *id.*,[19] but they do not effectively reach interstate conduct. Thus,

> a State cannot easily reach persons in other States who may have planned the illegal acts . . . . In these circumstances, as Attorney General Reno noted, local law enforcement efforts in different regions are impeded by difficulties in sharing information and coordinating responses.

Id. at 20. At the Senate hearings, New York Attorney General Robert Abrams presented examples of assaults on New York clinics by anti-choice activists from Georgia, California, Virginia, and elsewhere. *Id.* The City Manager of Falls Church, Virginia, testified that because the blockaders of clinics in his area came from other states, they were largely beyond the reach of Virginia law and state court injunctions. *Id.* Attorney General Reno echoed the message, testifying that "the problem transcends the ability of any single local jurisdiction to address it." *Id.* at 21 (testimony of Janet

---

Times, Apr. 21, 1992). The mayor promised local law enforcement would take action only after the State Attorney General threatened to sue him. S. Rep. at 19 n.34.

[18] *See also Libertad v. Welch*, 53 F.3d 428, 434 (1st Cir. 1995) ("local law enforcement officials expend a significant amount of time and resources; between forty-five and sixty officers are usually deployed for each protest").

[19] "[T]he offenders frequently return to the blockade or invasion immediately after their arrest, having been charged with fines equivalent to those for a speeding ticket . . . ." *Id.* at 20-21.

Reno, United States Attorney General); *see also National Organization for Women v. Operation Rescue*, 726 F. Supp. at 301-02 (finding "uncontradicted evidence that Operation Rescue and Project Rescue have been the motivating force behind other blockades similar to those presently threatened," and quoting from Operation Rescue leader Randall Terry's letter celebrating anti-abortion "rescues" in 46 cities, as well as successes in shutting down clinics in 17 cities).

Anti-choice zealots travel across the country targeting a few regions at a time. For example, the massive "Summer of Mercy" assaults and blockades so overwhelmed the local Wichita police that 100 federal marshals had to be called in to control the mob violence, and clinics were forced to close for six days. *United States v. Cooley*, 787 F. Supp. 977, 980 (D. Kan. 1992), *vacated and remanded*, 1 F.3d 985 (10th Cir. 1993). This "success" by Operation Rescue led it to launch other missions, such as the massive April 1992 "Spring of Life" blockade campaign in Buffalo, in which hundreds of blockaders engaged in orchestrated shut-downs of area clinics. *See* Jeannie Ralston & Barbara Maddux, *The Great Divide*, Life, July 1992, at 32.[20/]

The congressional findings on inadequacies in the existing federal law and the failures of state and local law enforcement to protect access to reproductive health care facilities lend further support to Congress' authority to enact FACE pursuant to the Commerce Clause.

[20/] Shortly therafter, anti-abortion leader Reverend Schenck conducted a nationwide "twelve-week Operation Rescue training program designed to teach leaders in the anti-abortion movement the most effective techniques to further their cause." Lynne Bumpus-Hooper, *Anti-Abortion Leader Draws `Battle Plan,'* Orlando Sentinel Trib., Feb. 21, 1993, at B3. He urged anti-abortion activists, *inter alia*, to become "subversives," and to blockade and gain control of medical facilities. *Id.*

CONCLUSION

In light of the extensive legislative findings reflecting that Congress enacted FACE to address a nationwide campaign of violence and obstruction directed at reproductive health care providers, to protect public health and safety, and to ensure that women are able to exercise their constitutional right to choose, Intervenor-Respondents respectfully request that the petition for a writ of certiorari be denied.

Dated: May 8, 1997

Respectfully submitted,

Michael E. Erdos
Priscilla J. Smith
Kathryn Kolbert
The Center for Reproductive Law & Policy
12th Fl.
120 Wall St., 18th Fl.
10013
New York, New York 10005
(212) 514-5534
Roger Evans
Celeste Lacy Davis
Legal Action for Reproductive Rights
Planned Parenthood of America
810 Seventh Avenue
New York, NY 10019

*Counsel of Record

Martha F. Davis*
Yolanda S. Wu
NOW Legal Defense & Education Fund
99 Hudson St.,

New York, New York

(212) 925-6635

John Vanderstar
Covington & Burling
1201 Pennsylvania Ave., NW
Washington, D.C. 20044-7566

Counsel for Intervenor

Supreme Court, U.S.
FILED
MAY 9 1997
OFFICE OF THE CLERK

No. 96-1425

In the Supreme Court of the United States

OCTOBER TERM, 1996

RANDALL A. TERRY, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WALTER E. DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARK B. STERN
SUSHMA SONI
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Congress lacked authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), 18 U.S.C. 248.

2. Whether the Access Act is an unconstitutional viewpoint-based restriction on speech.

3. Whether the Access Act is unconstitutionally overbroad or vague.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement:	
1. *Statutory Background*	1
2. *Factual and Procedural Background*	4
Argument	8
Conclusion	19

TABLE OF AUTHORITIES

Cases:

American Communications Ass'n v. *Douds*, 339 U.S. 382 (1950)	19
American Life League, Inc. v. *Reno*, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995)	5, 8, 15, 16
Cameron v. *Johnson*, 390 U.S. 611 (1968)	13, 18
Cheffer v. *Reno*, 55 F.3d 1517 (11th Cir. 1995)	5
Cox v. *Louisiana*, 379 U.S. 536 (1965)	13
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	18, 19
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	12
Hoffman v. *Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996)	8
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	11
Madsen v. *Women's Health Ctr., Inc.*, (1994)	13, 16, 17
Perez v. *United States*, 402 U.S. 146 (1971)	9
R.A.V. v. *City of St. Paul*, 112 S. Ct. 2538 (1992)	13

Cases—Continued: Page

Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) 14
Schenck v. *Pro-Choice Network of Western New York*, 117 S. Ct. 855 (1997) 17, 18
Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991) 10
United States v. *Dinwiddie*, 76 F.3d 913 (8th Cir.), cert. denied, 117 S. Ct. 613 (1996) 8
United States v. *Lopez*, 115 S. Ct. 1624 (1995) 6, 9, 11, 12
United States v. *O'Brien*, 391 U.S. 367 (1968) 5, 6, 15, 16
United States v. *Soderna*, 82 F.3d 1370 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996) 8
United States v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996) 8
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 14
Wickard v. *Fillburn*, 317 U.S. 111 (1942) 9
Wisconsin v. *Mitchell*, 508 U.S. 476 (1993) 7, 13, 14
Woodall v. *Reno*, 47 F.3d 656 (4th Cir.), cert. denied, 115 S. Ct. 2577 (1995) 8

Constitution, statutes and rule:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 5, 6, 8, 9
Amend. I 4, 6, 7, 8, 13, 15
Amend. V 4, 13
Amend. VIII 4, 5
Amend. X 4
Amend. XIV 4, 9
Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (18 U.S.C. 248) *et seq.*:
§ 2, 108 Stat. 694 14
§ 3, 108 Stat. 694 3
18 U.S.C. 248 2

Statutes and rule—Continued: Page

18 U.S.C. 248(a) 3-4
18 U.S.C. 248(a)(1) 14
18 U.S.C. 248(a)(3) 14
18 U.S.C. 248(d)(1) 4
18 U.S.C. 248(e)(2) 18
18 U.S.C. 248(e)(3) 19
18 U.S.C. 248(e)(4) 18
18 U.S.C. 248(e)(5) 15
Gun Free School Zones Act of 1990, Pub. L. No. 101-647, Tit. XVII, § 1702, 104 Stat. 4844 ..... 11, 12
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 4
Fed. R. Civ. P. 12(c) 4, 7

Miscellaneous:

H.R. Conf. Rep. No. 488, 103 Cong., 2d Sess. (1994) 2, 3, 10
H.R. Rep. No. 306, 103d Cong., 1st Sess. (1993) 2, 3, 11
S. Rep. No. 117, 103d Cong., 1st Sess. (1993) 2, 3, 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1425

RANDALL A. TERRY, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 101 F.3d 1412. The opinion of the district court (Pet. App. 24a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on March 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Background*

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), Pub. L. No. 103-

259, § 3, 108 Stat. 694, 18 U.S.C. 248, in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.). From 1977 through April 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. *Ibid.*; H.R. Rep. No. 306, 103d Cong., 1st Sess. 6 (1993) (H.R. Rep.). Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. S. Rep. 3, 6; H.R. Rep. 6-7, 9; H.R. Conf. Rep. No. 488, 103 Cong., 2d Sess. 7 (1994) (Conf. Rep.). That violence endangered the lives of, and inflicted injuries on, physicians, clinic staff and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. S. Rep. 5.

Groups opposed to abortion organized blockades designed to bar access to health care facilities where abortions were performed and to overwhelm local law enforcement. S. Rep. 7; H.R. Rep. 7. From 1977 through April 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. S. Rep. 7; H.R. Rep. 7. Providers of abortions also received numerous death threats. S. Rep. 10.

Violence and blockades aimed at abortion providers and facilities have occurred in at least 28 States, the District of Columbia, and dozens of cities across the country. S. Rep. 12. Many of these activities have been organized nationwide and directed across state lines. *Id.* at 13; H.R. Rep. 9-10. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. S. Rep. 31. Many patients who seek

abortion services travel across state lines to obtain services, and clinic employees sometimes travel across state lines to work. *Ibid.*

The declared purpose and the effect of the violent and obstructive activities have been to inhibit women's access to safe and legal abortion services. S. Rep. 11 & n.22. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and by closing clinics. *Id.* at 11, 17. The evidence before Congress demonstrated that the campaign to eliminate abortion services through violence and obstruction was succeeding and had forced many clinics to close. *Id.* at 14, 17, 31; H.R. Rep. 8-9.

Congress found that the violent and obstructive conduct burdens interstate commerce by

> interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

H.R. Conf. Rep. 7; see also S. Rep. 14, 17, 31-32. Congress found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. S. Rep. at 19-21; H.R. Rep. 6, 10.

The Act provides civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person

> is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services * * *.

18 U.S.C. 248(a). The Act specified, as one of its "Rules of Construction," that "[n]othing in this section shall be construed * * * to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. 248(d)(1).

2. *Factual and Procedural Background*

a. On May 26, 1994, the date that the President signed the Access Act into law, petitioners brought the instant suit challenging the constitutionality of the Access Act, both on its face and "as applied or threatened to be applied to them." Pet. App. 3a. Petitioners are abortion opponents who have participated in protests outside reproductive health facilities. *Id.* at 3a-4a. They alleged that the Access Act violates the First, Fifth, Eighth, Tenth, and Fourteenth Amendments, and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.2000bb *et seq.* Pet. App. 25a-26a.

The district court granted the government's motion, under Fed. R. Civ. P. 12(c), for judgment on the pleadings. Pet. App. 24a-35a. The court agreed

with the various courts of appeals and district courts that already had upheld the constitutionality of the Access Act against similar challenges. *Id.* at 27a-28a & n.2. The court emphasized that the Access Act regulates conduct, not speech, unless the speech constitutes a threat of force. *Id.* at 29a. The court adopted the reasoning of the Fourth Circuit in *American Life League, Inc.* v. *Reno*, 47 F.3d 642, cert. denied, 116 S. Ct. 55 (1995), and ruled that the Access Act is viewpoint and content neutral, that it is not unconstitutionally overbroad or vague, that its incidental effect on speech passes the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), and that it does not constitute a prior restraint. Pet. App. 29a-30a. The court also held that the Access Act is not an irrational restraint on speech, that sufficient alternative channels of communication remain available, that the Act does not interfere with freedom of the press, and that it does not interfere with petitioners' right of freedom of assembly. *Id.* at 30a-31a. The district court rejected petitioners' due process and equal protection claims as well, and ruled that their Eighth Amendment claim was not ripe for review. *Id.* at 31a-32a. The court concluded that the Access Act does not violate RFRA because, assuming *arguendo* that the Act substantially burdens petitioners' exercise of religion, the Act is sufficiently narrowed to further compelling government interests. *Id.* at 34a-35a.

The district court rejected petitioners' Commerce Clause challenge, agreeing with the Eleventh Circuit's conclusion in *Cheffer* v. *Reno*, 55 F.3d 1517, 1520 (1995), that the Access Act "protects and regulates commercial enterprises operating in interstate commerce" and is, therefore, a permissible exercise of congressional power. Pet. App. 33a.

b. The court of appeals affirmed. Pet. App. 1a-23a. The court stated its agreement with the four other circuits that had considered, and sustained, the constitutionality of the Access Act. *Id.* at 2a. The court held that Congress did not exceed its commerce power in enacting the Access Act because the legislative record underlying the Act "contains sufficient findings to conclude that violent and obstructive protest activities substantially affect interstate commerce in reproductive health services." *Ibid.*; see *id.* at 6a-11a (detailing findings). The court also held that the Access Act's lack of a jurisdictional element did not render it invalid under the Commerce Clause in light of Congress's legislative findings of the effect on interstate commerce of the regulated activities. *Id.* at 12a-13a (relying on *United States* v. *Lopez*, 115 S. Ct. 1624 (1995)).

The court of appeals rejected petitioners' First Amendment challenges, finding that the Act prohibits certain conduct, not speech, and is, in that respect, "virtually identical to the statute upheld in *United States* v. *O'Brien*, 391 U.S. 367 (1968), which also punished conduct—the destruction of draft cards." Pet. App. 13a. The court concluded that, to the extent any of the prohibited conduct might have expressive value, the Act satisfies the *O'Brien* test because it is narrowly tailored to further important government interests that are unrelated to the suppression of free expression. Pet. App. 13a-16a. The court ruled that the motive requirement of the Act—that a person violates the Act by engaging in the prohibited conduct "because" another person is obtaining or providing reproductive health services—does not render it unconstitutional because that requirement merely narrows the Act's reach. *Id.* at 18a. The court found

the instant case indistinguishable from *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), in which this Court upheld, against First Amendment challenge, a statute that enhanced a criminal sentence if the defendant engaged in the prohibited conduct because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry. Pet. App. 16a-17a. The court concluded that the Act is not unconstitutionally overbroad or vague and rejected petitioners' equal protection claim. *Id.* at 18a-21a.[1]

The court rejected petitioners' contention that the district court had disregarded evidence that the government had attempted to apply the Access Act to enjoin persons engaged in protected First Amendment activity near abortion clinics. Pet. App. 21a-22a. The court found that, in none of the cases cited by petitioners, had the government attempted to use the Act to punish First Amendment activity, and that petitioners' argument came "perilously close to misstating the record." *Id.* at 21a. Finally, the court rejected petitioners' claim that the government was not applying the Act evenhandedly. The court noted that petitioners had not alleged selective prosecution in their complaint and that, in ruling on the government's Rule 12(c) motion, the district court had properly refused to consider evidence beyond the scope of the complaint. Pet. App. 22a-23a.

---

[1] The courts below also declined to address various claims that petitioners had not properly raised or preserved (Pet. App. 4a-5a), and petitioners do not present any of those issues for this Court's review.

ARGUMENT

Petitioners contend that Congress lacked authority under the Commerce Clause to enact the Access Act (Pet. 8-15), and that the statute violates the First Amendment (Pet. 15-25). Petitioners' arguments are substantially similar to arguments raised in several petitions for writs of certiorari that the Court recently declined to review: *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 647 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995); *Woodall* v. *Reno*, 47 F.3d 656 (4th Cir.), cert. denied, 115 S. Ct. 2577 (1995); *United States* v. *Soderna*, 82 F.3d 1370 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996); *United States* v. *Dinwiddie*, 76 F.3d 913 (8th Cir.), cert. denied, 117 S. Ct. 613 (1996); and *United States* v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996). The Court should deny review in the instant case for the same reasons. The court of appeals' decision is correct and does not merit further review.[2]

---

[2] Petitioners acknowledge (Pet. 5-6 n.3) that all the federal courts of appeals that have considered constitutional challenges to the Access Act have upheld the validity of the Act. They also acknowledge (*ibid.*) that at least half a dozen district courts have held that the Act survives constitutional scrutiny. They nonetheless contend that the opinions of two district courts (one that was overruled and another that is pending on appeal), and a single dissenting judge in the courts of appeals, persuasively demonstrate that the Access Act is unconstitutional. *Ibid.* (citing cases). The district court decision on which petitioners rely, and which is pending appeal, conflicts with the binding precedent of its own circuit, see *American Life League, supra*, and obviously does not create an inter-circuit conflict calling for this Court's review. See *Hoffman* v. *Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996), appeal pending, Nos. 96-1581, 96-1582 and 96-1583 (4th Cir.) (argued Apr. 9, 1997).

1. Petitioners claim (Pet. 8-15) that the decision below conflicts with the Court's decision in *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), because, in their view, the Access Act does not address activities that substantially affect interstate commerce.

The Court in *Lopez* reaffirmed Congress's power under the Commerce Clause to regulate three broad categories of conduct. 115 S. Ct. at 1629-1630. First, Congress is empowered to regulate the use of the channels of interstate commerce. *Id.* at 1629. Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* Third, Congress is empowered to regulate or prohibit "activities that substantially affect interstate commerce." *Id.* at 1629-1630.

The court of appeals correctly held that the Access Act is a valid exercise of Congress's power to regulate "activities that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630.[3] Congress is empowered to regulate conduct that substantially affects interstate commerce when considered in the aggregate. *Wickard* v. *Fillburn*, 317 U.S. 111, 124-125, 127-129 (1942). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (emphasis omitted)

---

[3] We also maintain that the Access Act is a proper exercise of Congress's power, under the Commerce Clause, to regulate or to protect "persons or things in interstate commerce," *Lopez*, 115 S. Ct. at 1629, and under Section 5 of the Fourteenth Amendment. Because the court of appeals did not reach these questions, however, they are not before the Court.

(upholding federal law criminalizing loan sharking without regard to whether particular loan transaction affected interstate commerce); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329-330 (1991) (boycott against one ophthalmologist affects interstate commerce).

Congress had a rational basis for concluding that the violent and obstructive activities prohibited by the Access Act "substantially affect interstate commerce" by their adverse impact on clinics and other providers of reproductive health services who are involved in interstate commerce:

> Clinics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce.

S. Rep. 31. Also, many patients who seek abortion services "engage in interstate commerce by traveling from one state to obtain services in another," "[c]linic employees sometimes travel across State lines to work as well," and "some doctors who perform abortions work in facilities in more than one State." *Ibid.*

The violent and obstructive conduct proscribed by the Access Act substantially interferes with such interstate commerce. Such conduct disrupts the sale of services and goods, the employment of personnel and generation of income, the purchase and lease of facilities and equipment, and the purchase of medicine and supplies from other States. H.R. Conf. Rep. 7; S.

Rep. 14, 17, 31; H.R. Rep. 8-9. Activity prohibited by the Act forced some clinics to close, caused millions of dollars in damages to others, impeded the interstate movement of people and goods, contributed to a nationwide shortage of reproductive health services, and threatened to eradicate those commercial services from the national market. S. Rep. 3, 5, 17, 31; H.R. Rep. 8. Extensive evidence that interference with abortion services is a problem of national scope further buttresses Congress's conclusion that the proscribed conduct has a substantial aggregate effect on interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 300-301 (1964) ("nationwide scope" of the problem of racial discrimination supported Congress's conclusion that it substantially affected interstate commerce).

Nothing in *Lopez* calls into question the court of appeals' holding. The Court in *Lopez* struck down the provision of the Gun Free School Zones Act of 1990, Pub. L. No. 101-647, Tit. XVII, § 1702, 104 Stat. 4844, that made criminal the possession of a firearm in the vicinity of a school. The Court reasoned that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 115 S. Ct. at 1630-1631; *id.* at 1640 (Kennedy, J., joined by O'Connor, J., concurring). The Court concluded that the mere possession of an otherwise lawful firearm in a school zone bears such an attenuated relationship to interstate commerce that the Court would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce. *Id.* at 1634. The Court also noted the absence of evidence or congressional findings demonstrating that the regu-

lated conduct substantially affects interstate commerce. *Id.* at 1631-1632.

The Access Act differs markedly from the Gun Free School Zones Act. The Access Act "by its terms" directly addresses "commerce" and "economic enterprise[s]." *Lopez*, 115 S. Ct. at 1630-1631. It prohibits interference with commercial enterprises and with persons because they are engaging in commerce (*i.e.*, providing or obtaining the commercial service of reproductive health care). Unlike in *Lopez*, where neither the prohibited conduct (possession of a gun near schools) nor its immediate effect (increased potential for violence in schools) was commercial, here the immediate effect of the prohibited conduct is obstruction of commercial transactions. In addition, in contrast to *Lopez*, the effect of physical obstruction of reproductive health service facilities on interstate commerce is direct: it interferes with persons, things, and the provision of services in interstate commerce and threatens in the aggregate to eliminate abortion services from the national commerce. S. Rep. 3, 31. Also, the Access Act, unlike the Gun Free School Zones Act as originally adopted, is supported by a legislative record containing abundant evidence and specific findings by Congress showing that the proscribed conduct substantially impedes interstate commerce—findings to which the courts must defer. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

The *Lopez* Court reaffirmed that Congress's commerce power extends to activities that *either* "arise out of *or* are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce." 115 S. Ct. at 1631 (emphasis added). Indeed, nothing in that decision

questions the power of Congress to prohibit the use, as distinguished from the mere possession, of firearms in certain situations. Here, the conduct proscribed by the Act is undoubtedly "connected with a commercial transaction" because it interferes with persons who are providing or obtaining a particular commercial service (*i.e.*, reproductive health care).

2. Petitioners contend (Pet. 15-21) that the Access Act is facially invalid under the First and Fifth Amendments because it singles out abortion opponents for selectively harsh treatment and constitutes a viewpoint-based ban on speech.[4]

a. The Access Act regulates conduct, not speech. The Act does not prohibit speech—even speech that strongly opposes abortion—in the immediate vicinity of facilities that provide abortions. Instead, it prohibits the use of "force," the "threat of force," and "physical obstruction" to achieve certain ends. 18 U.S.C. 248(a)(1). As this Court has made clear, such conduct is outside the scope of First Amendment protection. See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993) (violence and physical assaults not protected by First Amendment); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 774 (1994) (threats not protected by First Amendment); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) (same); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (First Amendment does not create right to cordon off streets or entrances to a building); *Cameron* v. *Johnson*, 390 U.S.

---

[4] To the extent petitioners may be making a selective enforcement argument (see Pet. 5-7, 15-16), the courts below rejected that claim as beyond the allegations of the complaint (see Pet. App. 22a-23a) and, therefore, it is not properly before this Court.

611 (1968) (upholding statute forbidding unreasonable interference with access to buildings). Congress may proscribe such activities, even when they are designed to communicate a message, because they "produce special harms distinct from their communicative impact." *Mitchell*, 508 U.S. at 484-485 (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984)).

Contrary to petitioners' assertion, the Access Act is viewpoint neutral because it "serves purposes unrelated to the content of expression." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The Act is justified, not by reference to the viewpoint of any expression it may incidentally affect, but by the needs to protect interstate commercial transactions, to protect women who seek to exercise their constitutional right to reproductive choice, and to maintain public safety and order. Pub. L. No. 103-259, § 2, 108 Stat. 694 (Purposes). Those interests are unrelated to any expressive content the forbidden conduct may have. The Act permits the expression of any message, including a message of hostility to abortion.

Petitioners argue (Pet. 18-21), however, that the Access Act is viewpoint based because it proscribes certain activities only when the person acts because another person is seeking to obtain or provide reproductive health services, or because a facility provides such services. See 18 U.S.C. 248(a)(1) and (a)(3). This requirement concerns the motive of a violator, not the message that person wishes to convey. The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Mitchell*, 508 U.S. at 485-486.

The Access Act does not target persons because they have an anti-abortion viewpoint. The Act does not limit its protection to "abortion clinics"; rather, it prohibits interference with persons because they are providing or obtaining "services relating to pregnancy," including counselling that an anti-abortion group might give to a pregnant woman to urge her *not* to have an abortion, and medical care to assist women in carrying their pregnancies to term. 18 U.S.C. 248(e)(5). The use of force or physical obstruction to blockade a facility providing such services violates the Act to the same extent as a blockade of a facility offering abortion services. The Act targets intentional interference with any reproductive health service, regardless of the perpetrator's views about abortion. For example, a person who supports the right to abortion might have purely personal reasons for desiring to stop a particular woman from having a particular abortion; the use of force or obstruction to achieve that end would violate the Act.

b. If we assume, *arguendo*, that the conduct prohibited by the Access Act has sufficient expressive content to implicate the First Amendment, the Act would easily survive scrutiny under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Act (1) serves substantial governmental interests, (2) restricts conduct for reasons unrelated to its expressive content, and (3) does not impinge unnecessarily on expression. See *id.* at 377.

The Act serves substantial and legitimate governmental interests, including protecting interstate commercial transactions, preventing violence, preserving public access to health care, and protecting the exercise of the right to abortion. And, as we have

explained above, those interests are unrelated to any expressive content the forbidden conduct may have.

The fact that, in practice, the majority of persons who wish to engage in conduct that would violate the Access Act may be persons who desire to express a message of hostility to abortion does not undermine the constitutionality of the Act. As *O'Brien* established, if a statute neutrally proscribes conduct, the fact that people who follow a particular ideology are more likely than others to engage in that conduct, or that such people wish to use illegal activity to express a message, does not affect the validity of the prohibition. The law at issue in *O'Brien* forbade the destruction of draft cards—conduct that, at the time the law was passed, was generally engaged in only by persons intending to express a message of hostility towards the Vietnam war. The law was nonetheless held constitutional because it proscribed conduct without regard to any intended or unintended message. The Access Act similarly proscribes obstructive, threatening, and violent conduct, without regard to the viewpoint of the violator or content of the message he or she may want to send.

The Access Act is narrowly tailored so as not to impinge unnecessarily on expression. It is carefully drawn to prohibit only unprotected conduct, not speech. Its limiting definitions of key statutory terms further ensure that it proscribes only force, threats, and blockades that interfere with access to reproductive health care. The Act does not restrict the ability of abortion opponents to communicate with their desired audience. The statute permits speech, signs, prayers, non-obstructive picketing, distribution of handbills, and other peaceful forms of expression, even in the immediate vicinity of covered

facilities and regardless of the content of the speech. *American Life League*, 47 F.3d at 648.

This Court's recent decisions in *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), and *Schenck* v. *Pro-Choice Network of Western New York*, 117 S. Ct. 855 (1997), support the Access Act's constitutionality. In *Madsen*, a state court enjoined certain anti-abortion protestors who had engaged in specific protests outside a particular health clinic from, *inter alia*, engaging in essentially the same conduct that is forbidden by the Access Act—interfering with access to, ingress into, and egress from the clinic; and physically abusing, intimidating, harassing, touching, or assaulting persons entering or leaving the clinic, or harassing, intimidating or threatening any employee of the clinic. The injunction also enjoined the protestors from, *inter alia*, congregating or demonstrating in a fixed zone around the clinic entrances, and making loud noises outside the clinic. See 512 U.S. at 759-761. The Court upheld those aspects of the injunction, concluding that those restrictions were content neutral, that they were unrelated to the defendants' message, and that they burdened no more speech than necessary. *Id.* at 762-764, 768-770, 772. Similarly, in *Schenck*, the Court upheld certain provisions in a preliminary injunction that banned demonstrating within fixed 15-foot buffer zones around clinic doorways, driveways, and driveway entrances. 117 S. Ct. at 868-869. The Court reaffirmed *Madsen*, and ruled that the fixed buffer zone limitations were valid because they were justified by significant government interests in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom

to seek pregnancy-related services, and were appropriately tailored to serve those interests. *Id.* at 866, 868-869.

3. Petitioners assert (Pet. 21-25) that the Access Act is unconstitutionally vague and overbroad.

The statutory terms challenged by petitioners give people of ordinary intelligence "a reasonable opportunity to know what is prohibited." *Schenck*, 117 S. Ct. at 869-870 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). For example, the term "physical obstruction," is defined by the Act to mean

> rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous.

18 U.S.C. 248(e)(4). That provision is almost identical to one the Court upheld against a vagueness challenge in *Cameron* v. *Johnson*, 390 U.S. 611 (1968). That case concerned a Mississippi law that made it a crime for

> any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from [specified buildings].

Id. at 612 n.1. As in *Cameron*, the statute here "clearly and precisely delineates its reach in words of common understanding." *Id.* at 616.

The Act similarly defines other statutory terms in words of common understanding: "interfere with" means "to restrict a person's freedom of movement" (18 U.S.C. 248(e)(2)), "intimidate" means "to place a

person in reasonable apprehension of bodily harm to him or herself or to another" (18 U.S.C. 248(e)(3)). The court of appeals correctly concluded that, in light of the statute's explicit definition of various terms and its plainly legitimate sweep, it is not overly broad or vague: "While 'the fertile legal "imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question,"' the Access Act defines its terms narrowly and in clearly understandable language." Pet. App. 20a (quoting in part, *Grayned*, 408 U.S. at 110 n.15, and *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER E. DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARK B. STERN
SUSHMA SONI
Attorneys

MAY 1997